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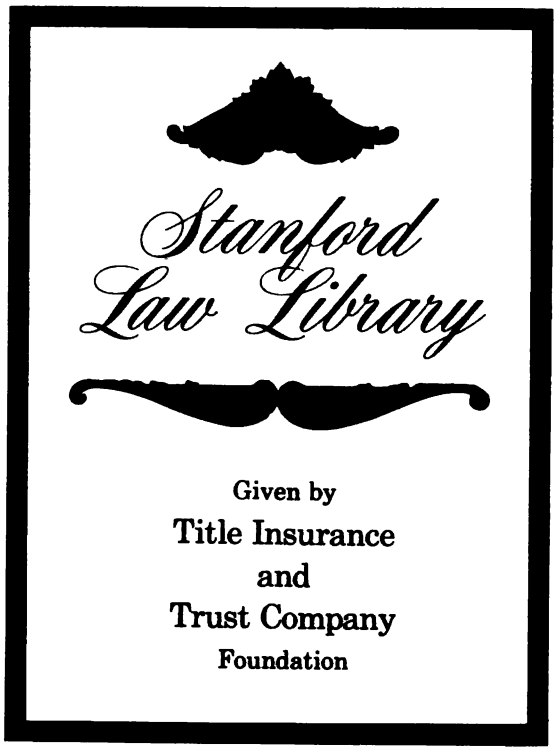
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OF

The Laws of England

RESPECTING

REAL PROPERTY.

By WILLIAM CRUISE, Esq.

BARRISTER AT LAW.

THE FOURTH EDITION.

REVISED AND CONSIDERABLY ENLARGED

By HENRY HOPLEY WHITE, Esq.

BARRISTER AT LAW, OF THE MIDDLE TEMPLE.

IN SEVEN VOLUMES.

VOLUME III.

CONTAINING

Title 21. Advowson.
22. Tithes.
23. Common.
24. Ways.
25. Offices.
26. Dignities.
27. Franchises.
28. Rents.
29. Descent.
30. Escheat.
31. Prescription.

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OF THE

THIRD VOLUME.

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TITLE XXXI.

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A DIGEST

OF

The Laws of England

RESPECTING

REAL PROPERTY.

TITLE XXI.

ADVOWSON.

CHAP. I.

Of the Origin and Nature of Advowsons.

CHAP. II.

Of Presentation, Institution, and Induction.

CHAP. I.

Of the Origin and Nature of Advowsons.

SECT. 1. *Incorporeal Property.*
2. *Origin of Advowsons.*
4. *Description of.*
6. *Right of Nomination.*
8. *Advowsons appendant.*
12. *Advowsons in Gross.*
19. *Presentative, Collative, and Donative.*
23. *How a Seisin is acquired in.*
SECT. 24. *What Estates may be had therein.*
26. *Subject to Curtesy.*
29. *And to Dower.*
31. *May be Aliened for ever.*
32. *Or for the next Presentation.*
40. *Is Assets for Payment of Debts.*

SECTION I.

Incorporeal property.

HAVING treated in the preceding Titles of corporeal property, it will now be necessary to discuss the nature of incorporeal hereditaments, and the rules by which they are governed. Incorporeal hereditaments consist of rights and profits arising from, or annexed to lands; their essence being merely in idea

2 Comm. 20.

and abstracted contemplation, though their effects and profits may frequently be objects of our bodily senses. *Hæreditas, alia corporalis est, alia incorporalis; corporalis est quæ tangi potest et videri; incorporalis quæ tangi non potest, nec videri.*

1 Inst. 9 a.

The principal kinds of incorporeal hereditaments are,—advowsons, tithes, commons, ways, offices, dignities, franchises, and rents. To these, Sir W. Blackstone had added two others, corrodies and annuities, which are here omitted.

Origin of advowsons. 1 Inst. 17 b. 119 b. Watson's Com. Incumb. 64. edit. 1725.

2. In the early ages of Christianity the nomination of all ecclesiastical benefices belonged to the church. When the piety of some lords induced them to build churches upon their own estates, and to endow them with glebe lands, or to appropriate the tithes of the neighbouring lands to their support, the bishops, from a desire of encouraging such pious undertakings, permitted those lords to appoint whatever clergyman they pleased to officiate in such churches, and receive the emoluments annexed to them; reserving, however, a power to themselves to judge of the qualification of those who were thus nominated.

3. This practice, which was originally a mere indulgence, became in process of time a right; and all those who had either founded or endowed a church claimed and exercised the exclusive privilege of presenting a clerk to the bishop whenever the church became vacant.

Description of 1 Inst. 17 b.

4. An advowson (*a*) is, therefore, a right of presentation to a church or ecclesiastical benefice. The word is derived from *advocatio*, which signifies *in clientelam recipere;* for in former times the person to whom this right belonged was called *advocatus ecclesiæ*, because he was bound to defend and protect, both the rights of the church, and the incumbent clerks, from oppression and violence. Hence the right of presentation acquired the name of advowson, and the person possessed of this right was called the patron of the church.

Idem.

5. Lord Coke says, there may be several patrons, and two several incumbents, in one church; the one of the one moiety, and the other of the other moiety. And one part, as well of the church as of the town, allotted to the one, and the other

(*a*) The law of advowsons is here only treated of as far as lay patrons are concerned.

part thereof to the other; which is called *advocatio medietatis ecclesiæ.*

6. The right of presentation, and that of nomination to a church, are sometimes confounded: but they are distinct things. Presentation is the offering a clerk to the bishop; nomination is the offering a clerk to the patron. These rights may exist in different persons at the same time. Thus a person seised of an advowson may grant to A. and his heirs, that whenever the church becomes vacant, he will present to the bishop such person as A. or his heirs shall nominate. This is a good grant, and the person to whom the right of nomination is thus granted, is to most purposes considered as patron of the church. Right of nomination. Plowd. 529. Wats. 90.

7. Where the legal estate in an advowson is vested in trustees, they have the right of presentation in them: but the right of nomination is in the *cestui que trust.* So in the case of a mortgagee of an advowson, the mortgagee has the right of presentation, but the mortgagor has the right of nomination. Tit. 12. Tit. 15. c. 2.

8. The right of presentation, which was originally allowed to the persons who built or endowed a church, became by degrees annexed to the manor in which it was erected; for the endowment was supposed to be parcel of the manor, and held of it; therefore it was natural that the right of presentation should pass with the manors, from whence the advowson was said to be appendant to the manor, being so closely annexed to it, that it passed as incident thereto, by a grant of the manor. Advowsons appendant.

9. Where an adowson has at all times whereof the memory of man is not to the contrary passed with the manor, by the words *cum pertinentiis,* it is to be taken as an adowson appendant. But though an adowson is said to be appendant to a manor; yet in truth it is appendant to the demesnes of a manor, which are of perpetual subsistence, and not to the rents and services, which are subject to extinguishment and destruction: from which it seems to follow that an adowson may be appendant as well to a reputed as to a real manor. Wats. 66. 1 Inst. 122 a. 2 Vin. Ab. 594. Dissert. ch. 3.

10. It was found, in a special verdict, that the abbot of S. was seised of capital messuage in F. and of one hundred acres of land there; that there was a tenancy holden of such capital messuage by certain services; that the said capital messuage Long v. Hemmings, 1 Leon. 207.

had been known, time out of mind, by the name of the manor of F.; and that the adowson was appendant to it. The Court was of opinion that here was a sufficient manor, to which an adowson might be well appendant.

2 Vin. Ab. 597.

11. It is said that if a person seised of a manor, to which an adowson is appendant, grants one or two acres of the manor, *una cum advocatione*, the adowson will become appendant to such one or two acres: but the land and the adowson must be granted by the same clause.

Advowsons in gross.

12. Where the property of an adowson has been once separated from the manor to which it was appendant, by any legal conveyance, it is then called an adowson in gross, and never can be appendant again; except in a few cases which will be mentioned hereafter.

Dyer 103.

13. An adowson appendant may become in gross by various means. 1. If the manor to which it is appendant is conveyed away in fee simple, excepting the adowson. 2. If the adowson is conveyed away without the manor to which it is appendant. 3. If the proprietor of an adowson appendant presents to it as an advowson in gross.

1 Inst. 122 a.

14. Where a manor, to which an advowson is appendant, descends to coparceners, who make partition of the manor, with an express exception of the advowson, it ceases to be appendant, and becomes in gross: but if coparceners make partition of a manor to which an advowson is appendant, without saying any thing of the advowson, it remains in coparcenary; and yet in every of their turns it is appendant to that part which they have.

Wats. 69.

15. An advowson may cease to be appendant for a certain time, and yet become again appendant. Thus, if an advowson is excepted in a lease for life of a manor, it becomes in gross during the continuance of the lease; but upon its expiration, it again becomes appendant. So, if an advowson appendant is granted to a person for life, it becomes in gross; if afterwards another person is enfeoffed of the manor to which it is appendant, with the appurtenances, in fee simple, the reversion of the advowson would pass, and at the expiration of the grant for life would again become appendant.

6 Rep. 64 a.

16. If a manor to which an advowson is appendant descend to two coparceners, and upon a partition the advowson is allotted to one, and the manor to the other, by this means the advowson

is become in gross: but if the coparcener, to whom the advowson was allotted, dies without issue, and without disposing of the advowson, it will descend to the other, and again become appendant.

17. An advowson may be appendant for one turn, and in gross for another. Thus if a person, having an advowson appendant, grants every second presentation to a stranger, it will be in gross for the turn of the grantee, and appendant for the turn of the grantor. Dyer 259 a. pl. 19.

18. It is said in Roll's Ab. that an advowson in gross lies in tenure, and in Brooke's Ab. tit. Tenure, pl. 15., a case is stated where, in a *quare impedit*, the plaintiff entitled himself, that the advowson was held of him by homage and fealty; and it was not contradicted that the advowson will lay in tenure. This doctrine is, however, contradicted in another part of Roll's Ab. where it is said, that if a man grants an advowson in gross to another in fee, and the grantee dies without heir, it seemed that it should revert to the grantor; not being held of any one. And that it seemed, if the grantor should not have it, the king should, as supreme ruler. Tit. Tenures, B. pl. 1. 20 Vin. Ab. 200. Tit. Escheat, pl. 6.

19. Advowsons are also presentative, collative, and donative. An advowson presentative is that which has been already described, namely, where the patron has a right of presentation to the bishop or ordinary, and also to demand of him to institute his clerk, if duly qualified. Presentative, collative, and donative. 2 Comm. 22.

20. An advowson collative is where the bishop and patron are one and the same person. In which case, as the bishop cannot present to himself, he does, by the one act of collation or conferring the benefice, the whole that is done in common cases by both presentation and institution. Idem.

21. An advowson donative is where the king, or any subject by his licence, founds a church or chapel, and ordains that it shall be merely in the gift or disposal of the patron, subject to his visitation only, not to that of the ordinary, and vested absolutely in the clerk, by the patron's deed of donation, without presentation, institution, or induction. 1 Inst. 344 a. Wats. 170. Shirt v. Carr, 2 Bro. P. C. 173.

22. If the patron of an advowson donative once presents to the ordinary, and allows of the admission and institution of his clerk thereon, he thereby renders his church always presentable, and it will never afterwards be donative. But if a stranger who Idem.

has no title presents a clerk to the ordinary, who is instituted and inducted, this will not render the donative presentable.

How a seisin is acquired in.

23. The existence of an advowson, like that of every other incorporeal hereditament, being merely in idea and abstracted contemplation, it is not capable of corporeal seisin or possession; therefore a presentation to the church is allowed to be equivalent to a corporeal seisin of land. But till the church becomes void, it is impossible to acquire any thing more than a seisin in law of an advowson.

What estate may be had therein.

24. A person may be tenant in fee simple of an advowson, as well as of a piece of land; in which case he and his heirs have a perpetual right of presentation. It may also be entailed within the statute *De Donis*, being an hereditament annexed to land: but an estate tail in an advowson cannot be discontinued; for nothing passes by the grant of it, but what the owner may lawfully give.

1 Inst. 322 b. 3 Rep. 85 b.

25. An advowson may also be limited to a person for life or years, in possession, remainder, or reversion. And it may be held in joint tenancy, coparcenary, and common.

Subject to curtesy. 1 Inst. 29 a.

26. A husband will be tenant by the curtesy of an advowson, though the church be not void during the coverture. For although, in this instance, the husband had but a seisin in law, yet as he could by no industry attain a seisin in deed, it will be sufficient.

Ab. Tit. Ten. *per le* Curt. pl. 2.

27. This point appears to have been determined in 21 Edw. 3. The case is thus stated by Broke.—In a *quare impedit* by the king against divers, the defendant made title that the advowson descended to three coparceners, who made partition to present by turns: that the eldest had her turn; afterwards the second her turn; and he married the youngest, had issue by her, and she died; the church voided; so it belonged to him to present; and did not allege that his wife ever presented, so as she had possession in fact. It was admitted that he might be tenant by the curtesy by the seisin of the others.

s. 468.

28. It is said by Perkins, that although the church become void during the coverture, and the wife die after the six months past, before any presentment by the husband, so that the ordinary presents for lapse to that avoidance, yet the husband shall present to the next avoidance as tenant by the curtesy.

1 Inst. 29 a. n.

Mr. Hargrave has observed on this passage, that such a case

is not within Lord Coke's reason for allowing curtesy of an advowson, without a seisin in deed; and that he did not find any authority to support this doctrine, besides Mr. Perkin's name.

29. Where a widow is endowed of a manor, to which an advowson is appendant, she is entitled to it; and if the church becomes vacant during the continuance of her estate in the manor, she may present to it. So if a widow is endowed of a third part of a manor, to which an advowson is appendant, the third part of the advowson shall pass. A widow is also dowable of an advowson in gross, and entitled to the third presentation.

And to dower. Dyer 35 b. Wats. 89.

Cro. Jac. 622.

30. Lord Coke says, if a man, seised of an advowson in fee, marries, his wife, by act in law, acquires a title to the third presentation; then if the husband grants the third presentation to a stranger, and dies, the heir shall present twice; the widow shall have the third presentation, and the grantee the fourth: for in this case it shall be taken to be the third presentation, which he might lawfully grant.

1 Inst. 379. a.

31. An advowson appendant may be aliened by any kind of conveyance that transfers the manor to which it is appendant. An advowson in gross may also be aliened, but being an incorporeal hereditament, and not lying in manual occupation, it does not pass by livery, but must always have been granted by deed; and although the law does not consider the exercise of the right of presentation as of any pecuniary value, or a thing for which a price or compensation ought to be accepted, yet the general right to present is considered as valuable, and an object of sale, which may be conveyed for a pecuniary or other good consideration.

May be aliened for ever.

Crispe's case, Cro. Eliz. 164.

Infra, c. 2.

32. An advowson may not only be aliened in fee, for life or years: but the next presentation, or any future number of presentations, may also be granted away.

Or for the next presentation.

33. It has been stated that where a married man granted the third presentation to a church, his wife being entitled to such third presentation, as part of her dower, the grantee should have the next presentation after the wife's; because the wife's title arose from an act of law, which shall not operate to the prejudice of the grantee. But where a man granted the next presentation to A., and before the church became void, he

Ante, s. 30.

1 Inst. 378 b.

granted the next presentation of the same church to B., the second grant was held void; for B.'s right of presentation was destroyed by the act of the party, not as in the former case, by an act in law.

34. It has been determined in a modern case that a grant of the next presentation to a church does not become void by the Crown's acquiring a right to present.

Troward *v.* Cailland, 2 H. Black. Rep. 324. 6 Term Rep. 439—778.

35. Sir K. Clayton, being seised in fee of an advowson, the church being then full, by a deed poll, granted to M. Kenrick, his executors, &c., the next presentation, donation, and free disposition of the said church, as fully, freely, and entirely as the said Sir K. Clayton or his heirs. The person who was then incumbent was made Bishop of Rochester, whereby the church became vacant; and the King, by reason of his royal prerogative, acquired a right to present a fit person to the said church. It was contended that, in the event that had happened, this grant became void; that in the case of Woodley *v.* Episc. Exeter, it was held the grantee of the next avoidance must have the next, or none at all, and must lose his right by the intervention of the prerogative, on the promotion of the incumbent to a bishopric. On the other side it was argued that the authority of the case of Woodley *v.* Episc. Exeter was expressly contradicted by the note in the margin of Dyer, 228 *b.*, which was apparently the same case, where it was stated to have been resolved by the Court that the grantee should have the next avoidance after the prerogative presentation, because that was the act of the law; and the prerogative of the King, which excluded him from the first presentation, injured no one.

Vide the King *v.* Ep. London, 1 Show. R. 441.

Cro. Jac. 691. Winch. 94.

The Court of Common Pleas held that the grantee of the next presentation should present on the next vacancy, occasioned by the death or resignation of the King's presentee. This judgment was affirmed by the Court of King's Bench; and afterwards by the House of Lords, with the assent of the Judges.

8 Bro. Parl. Ca. 71.

36. Where a person has only a particular estate in a manor, to which an advowson is appendant, he can of course only alien the advowson for so long as his estate shall continue.

Bowles *v.* Walter, 1 Roll. Ab. 843.

37. A tenant in tail of a manor, to which an advowson was appendant, granted the next avoidance of the advowson, and died: the issue entered on the manor, and the grant was held to be void.

38. Tenant in tail and his son joined in a grant of the next avoidance of a church; the tenant in tail died. It was adjudged that the grant was void against the son and heir that joined in the grant, because he had nothing in the advowson at the time of the grant, neither in possession nor right, nor in actual possibility. Wyvel's case, Hob. 45.

39. Lady Hobart being tenant for life of the manor of Clifton, to which the advowson of the Church of Clifton was appendant, sold the next presentation to Mr. Dymoke, and died before the church became void. It was resolved that the sale was void. Dymoke v. Hobart, 1 Bro. Parl. Ca. 108.

40. It is said by Lord Coke that an advowson is assets to satisfy a warranty; but that an advowson in gross is not extendible upon a writ of *elegit*, because no annual value can be set upon it. It has, however been determined that an advowson in gross, whether the proprietor has a legal or an equitable interest therein, is assets for payment of debts; and will be directed to be sold by the Court of Chancery, for that purpose. Is assets for payment of debts. 1 Inst. 374 b. 3 P. Wms. 301. 3 Atk. 464. See also stat. 3 & 4 Will. 4. c. 104.

41. John Tong being indebted to several persons, by judgment, bond, and simple contract, in great sums of money, died intestate; seised in fee, among other things, of the trust of an advowson in gross. Upon a bill filed by the creditors of John Tong, praying a sale of his real estate for the payment of his debts, a question arose whether this advowson was assets. Lord King decreed that it was, and should be sold for the payment of Tong's debts. Tong v. Robinson. 3 Vin. Abr. 144. 1 Bro. Parl. Ca. 114.

On an appeal from this decree to the House of Lords it was insisted by the appellants that this advowson was not assets at law, or liable to the demands of any of the creditors of Tong; because at law no inheritance was liable to any execution that was not capable of raising some profits towards satisfaction of the debt, which an advowson was not. On the other side it was contended that at common law an advowson in fee was an hereditament descendible to the heir, valuable in itself, and saleable; and even capable, if necessary, of having an annual value put upon it; and was therefore legal assets in the hands of the heir.

The decree was affirmed, with the concurrence of all the Judges.

Westfaling v. Westfaling, 3 Atk. 460.

42. In a case before Lord Hardwicke in 1746, one of the questions was, whether an advowson in gross was assets by descent. His Lordship observed, it had been said the authorities went no farther than where there had been a trust of an advowson, and did not extend to a legal interest: but that this argument was quite cut up by the roots by the determination of the House of Lords in the case of Tong v. Robinson. In the minute book of the day, it was taken down that the question proposed to be asked of the judges was, whether an advowson in fee was assets. It must have been defectively taken by the clerk; the question intended was, whether an advowson in gross in fee was assets; for there could be no doubt as to an advowson appendant to a manor, because the manor itself being assets, what was appendant must be assets likewise: and decreed that it was assets by descent, to satisfy specialty debts.

CHAP. II.

Of Presentation, Institution, and Induction.

SECT. 1. *Presentation.*
5. *Institution.*
7. *Induction.*
10. *Of Lapse.*
18. *Who may present.*
22. *Infants.*
25. *Joint Tenants.*
27. *Coparceners.*
32. *Tenants in Common.*
33. *Effect of a Partition.*
35. *Mortgagors may nominate.*
37. *And Tenants by Statute Merchant.*
38. *And Bankrupts.*
39. *Who are disabled from Presenting.*
45. *Lunatics.*
46. *Examination of the Clerk.*
52. *Of Simony.*
55. *Procuring a Presentation for money.*
63. *Sale of the Presentation during a Vacancy.*
69. *Sale of the next Presentation good.*
72. *Exception.*
74. *Resignation.*
78. *Bonds of Resignation.*

SECTION I.

AN advowson consisting in the right of presentation, it will be necessary to examine into the nature of this act, and the consequences that attend it; the time within which it is to be done, and the persons who are capable of performing it. Presentation.

2. Presentation (*a*) is the offering a clerk, by the patron or proprietor of an advowson, to the ordinary; which might formerly have been done either by word or by writing: but since the statute of Frauds, 29 Cha. 2. c. 3. s. 4. it is necessary that all presentations be in writing; and a presentation in writing is 1 Inst. 120.

(*a*) [The terms "presentation" and "nomination" are, as before observed, sometimes used synonymously, but they indicate distinct rights, which may in some cases exist in different persons: generally the person who has the legal estate is the person to present the clerk to the bishop; but the beneficial owner has the right of nominating the person to be presented. Thus when the legal estate of the advowson is vested in trustees, they have the legal authority to present the clerk; but the *cestui que trust* has the right of nomination. Barrett *v.* Glubb, 2 Sir W. Bl. 1052. Earl of Albemarle *v.* Rogers, 2 Ves. J. 477. Boteler *v.* Allington, 3 Atk. 458. So also the mortgagee of an advowson is the person to present, but the mortgagor has the right of nomination.—Vide infra, s. 35.] Sup. c. 1. s. 6.

a kind of letter, not a deed, from the patron to the bishop of the diocese in which the benefice is situated, requesting him to admit to the church the person presented.

3. A presentation, though duly made in all respects, may be revoked or varied. This was always held with respect to the king, but was doubted as to lay patrons. It appears, however, to be now fully settled that a lay patron may revoke his presentation at any time. Sir W. Blackstone has observed, that a presentation was certainly revocable by the principles of the common law, because it vested no right in any one, not even in the clerk presented; for if the clerk had a right, the law would give him a remedy to recover it when invaded. There was, however, no species of common law action open or competent to a clerk, to recover a presentation, when obstructed, but to the patron only. And it was said *arguendo*, in the House of Lords, that a presentation conferred no interest whatever.

Rogers v. Holled, 2 Black. R. 1040. 1 Bro. Parl. Ca. 117.

4. When the ordinary declares that he approves of the presentee, as a fit person to serve the church to which he is presented; the clerk is said to be admitted.

1 Inst. 244 a.

Institution. 1 Inst. 344 a.

5. Institution is the commitment to the clerk by the ordinary, of the cure of souls. The form and manner of it is thus; the clerk kneels before the ordinary, whilst he reads the words of the institution, out of a written instrument drawn up for this purpose, with the episcopal seal appendant to it, which the clerk holds in his hand during the ceremony.

Wats. 156.

6. The act of presentation only gives the clerk a right *ad rem*, but institution gives him a right *in re*: therefore the clerk, when instituted, may enter upon the glebe, and take the tithes; though he cannot yet sue for them.

Induction. Wats. 155.

7. After institution given, the ordinary issues his mandate for induction, directed to him who has the power to induct, of common right. This person is generally the archdeacon of the diocese; though others, by prescription or composition, may induct.

1 Burn's Ecc. Law, 156.

8. The induction is to be made according to the tenor and language of the mandate, by investing the clerk with full possession of all the profits belonging to the church. Accordingly the person who inducts usually takes the clerk by the hand, and lays it upon the ring of the church door; or if the church is in ruins, then upon the wall of the church or church-yard, and says

to this effect—" By virtue of this mandate, I do induct you into the real, actual, and corporeal possession of the church of C. with all the rights, profits, and appurtenances thereunto belonging." After which the inductor opens the door, and puts the clerk into the church, who usually tolls the bell, to make his induction public, and known to the parishioners. After this the inductor endorses a certificate of the induction on the mandate, which is witnessed by the persons present.

9. It has been stated that in the case of an advowson donative, neither presentation, institution, or induction, are necessary.

10. Presentation must be made within six calendar months after the death of the last incumbent, otherwise the right to present accrues or lapses to the ordinary. It being for the interest of religion that the church should be provided with an officiating minister, the law has therefore given this right of lapse, in order to quicken the patron, who might otherwise, by suffering the church to remain vacant, avoid paying his ecclesiastical dues, and thereby frustrate the pious intentions of the founder.

Of Lapse. Wats. c. 12.

Boteler v. Allington, 3 Atk. 458. cited 2 Mer. 492, 493.

11. As the computation of time concerns the church, it is made according to the rules of the canon law, that is, by the calendar, for one half year; not counting 28 days to the month. And the day on which the church becomes void is not to be taken in the account.

2 Inst. 361.

12. As to the time from which the six months are to commence, the rule of the canon law in all cases was, that the six months should be reckoned, not from the time of the voidance, but from the time when the patron had notice of the voidance. As if the incumbent dies beyond sea, the six months shall not be counted from the time of his death, but from the time of the patron's knowledge thereof.

2 Burn's Ecc. Law, 327. 2 Roll. Ab. 363.

13. It has also been held that although no lapse shall incur, if no notice be given; yet if in such a case a stranger presents, and his clerk is instituted and inducted, and the patron gives no disturbance within six months, he has no remedy for that turn; because induction is a notorious act of which he is bound to take notice.

Idem, 329.

14. Where a clerk is refused for want of learning, or on account of his morals, the patron ought to have notice, that he may pre-

Idem, 328.

sent another in due time; yet if he neglects to do so, the lapse shall incur from the death or cession of the former incumbent, not from the time of notice.

Idem, 329.

15. If the clerk be not refused, but the bishop only delays the examination of him, whereby the six months pass, no lapse shall incur; because the church remains void by the bishop's own fault; and he is thereby a disturber.

Idem, 115.

16. After the church has lapsed to the immediate ordinary, if the patron presents before the ordinary has filled the church, the ordinary ought to receive his clerk. For lapse to the ordinary is only an opportunity of filling a trust, viz. of appointing a proper person to supply the living, in the case of the patron's neglect, which being performed by the patron himself, the ordinary can then derive no advantage from it.

Wats. 107.

17. In the case of an advowson donative no lapse incurs by the non-presentation of the patron, within six months; the ordinary may, however, compel the patron to present by means of ecclesiastical censures.

Who may present.

18. With respect to the persons capable of exercising the right of presentation, all those who are sole seised in fee simple, fee tail, or for life, or possessed of a term for years, of a manor to which an advowson is appendant; or of an advowson in gross; may present to the church. And where a person is entitled to an advowson in right of his wife, he must present in his own name and that of his wife; and not in his own name only, in right of his wife.

C. 1. ss. 26. & 29.

19. It has been stated that a man may be tenant by the curtesy, and a woman tenant in dower of an advowson; in which cases they may present to the church, if it becomes vacant during their lives.

1 Inst. 388 a. Wats. 75.

20. Where a person is seised of an advowson, and the church becomes vacant in his lifetime; if he dies before he has presented, the right of presentation devolves to his executors or administrators, because it is considered as chattel real. But if the incumbent of a church be also seised in fee of the advowson of the same church, and dies, the right to present will devolve to his heir, and not to his executor; for the avoidance and descent to the heir happening at the same instant, the title of the heir shall be preferred, as the most ancient and worthy.(*a*)

Id. 76. Holt *v.* Bishop of Winchester, 3 Lev. 47. S. C. Salk. 280. Com. Dig. Tit. Eglise (H. 2.) 11 Vin. Abr. 169.

(*a*) [If a person seised of an advowson dies after avoidance, and before he has pre-

21. Where a person has a grant of the next presentation to a church, it is considered as a chattel real, which, if not disposed of, will vest in his executors. Smithley *v.* Chomley, Dyer 135 a.

22. Lord Coke says, a guardian in socage of an infant seised of a manor to which an advowson is appendant, shall not present to the church: because he can take nothing for the presentation for which he may account to the heir; and therefore the heir shall in that case present of what age soever he be. This doctrine is now fully established; and in the following case it was determined that an infant who was not a year old might nominate or present to a church. Infants. 1 Inst. 89 a. 3 —— 156.

23. Cyrill Arthington conveyed an advowson to trustees, upon trust to present such son of a particular person, as should be capable of taking the same, when the church became void; and if that person had no son qualified to take the living at that time, then in trust to present such person as the grantor, his heirs or assigns, should appoint; and in default of such nomination by the grantor or his assigns, that the trustees should present a person of their own choosing. The grantor died, leaving his son and heir an infant of six months old. The living became vacant; and the person named in the deed having then no son capable of taking the living, the guardian of the son took him in his arms, and guided his pen in making his mark; and made him seal a writing whereby one Hitch Arthington *v.* Coverley, 2 Ab. Eq. 518.

sented, in some cases, as stated above, the right devolves upon the executor; in others upon the heir or other person entitled to the advowson: upon this subject a distinction must be observed where the advowson is *presentative* or *donative*; and where it is in lay or ecclesiastical hands. Where the advowson, either in gross or appendant, is *presentative* and in lay hands, if the person seised of the advowson dies after avoidance, and before presentation, the right devolves upon his executor. 11 Vin. Abr. 145. F. N. B. 34. Co. Lit. 120. 3 Bing. 234. 251. But if the advowson be *donative*, the right will devolve upon the *heir*. Repington *v.* Governors of Tamworth School, 2 Wils. 150. cited 3 Bing. 232. 250. Where an ecclesiastical person is seised of the advowson, in right of his benefice as a prebendary in right of his prebend, if he dies after avoidance, and before presentation, it devolves upon his successor, and not upon his executor; because it is a spiritual trust reposed in him in right of his ecclesiastical benefice, and it cannot devolve upon the executor, since no one can exercise the right, who is not clothed with the ecclesiastical character, in respect of which the right accrues. Rennell *v.* Bishop of Lincoln, 3 Bing, 223. To this the case of a bishop seems to form an exception; for if the patron be a bishop, who dies after avoidance, and before the vacancy is filled up, the king shall present. Co. Lit 388 a. Watson, ch. 9. p. 48. cited 3 Bing. 236; one of the reasons assigned is, that nothing but induction fills the church against the king.]

was nominated and appointed to the trustees, in order to be presented by them to the living. The trustees supposing the plaintiff, as an infant, unable to make such an appointment, refused to present Mr. Hitch; upon which the infant brought his bill against the trustees, to have them execute their trust in presenting his nominee.

It was argued for the defendants that the presentations of clerks to bishops for admission to churches, was an act that required judgment and discretion, which an infant was not master of; and though the law suffered them to present to their own living, yet it was of necessity, because there was no one else to do it; and if they could not, then a lapse must incur; for a presentation to a living being a thing of no value, and therefore not to be accounted for, a guardian could not have it. Whereas in the present case, if the grantor or his heirs neglected, or were incapable of presenting, the trustees were expressly authorized to present, whose act would be considered as the act of the infant; so that no injury would be done to any body. And though, in cases of evident necessity, equity might square itself by law, yet where no such necessity appeared, reason and common sense ought to prevail; from whence it was inferred that the nomination, being an act requiring discretion and judgment, was void; and the trustees entitled to present their own clerk.

On the other side it was contended, that in the case of presentation, as an infant just born might present at law, so the law did not look on it as an act which required discretion in the patron; nor indeed was it requisite; for infants being supposed to follow the directions of their guardians, might be informed by them, who was a proper person; or if they were not, yet a presentation being only a bare recommendation of a clerk to the bishop, and not an act which gave any interest in the
Atk. 710. living, and the bishop being absolute judge of the person's abilities, there did not appear any great reason why an infant might not make it as well as a person of full age; and it was not of necessity that they must present; for though a lapse might incur, yet the presentation of the minor on the next vacancy was reserved, and nothing divested out of him by the bishop's collation; so that as to the infant, it was the same whether the bishops collated or the trustees presented: where-

fore they inferred equity ought to be bound to the law, since the case and reason of the thing was alike, for otherwise the greatest confusion and uncertainty would follow.

Lord King said—"An infant of one or two years old may present at law;—then why may they not nominate? Does the putting a mark and seal to a nomination require more discretion than to a presentation? The guardian is supposed to find a fit person, and the bishop to confirm his choice; and if this is permitted in law, why should a court of equity act otherwise in equitable estates?" Decree for the plaintiff.

24. Mr. Hargrave has observed, that though this decision may remove all doubts about the legal right of an infant of the most tender age to present, still it remains to be seen whether the want of discretion would induce a court of equity to control the exercise where a presentation was obtained from an infant, without the concurrence of the guardian. 1 Inst. 89 a. n 1.

25. Where an advowson is held in joint tenancy, all the joint tenants must join in the presentation. And where an advowson is vested in trustees and their heirs upon trust to present to the church whenever a vacancy happens, they are joint tenants; and must therefore, upon any avoidance, all join in the presentation. Joint tenants. Wilson v. Kirkshaw, 1 Ves. 413. 7 Bro. Parl. Ca. 296.

26. If there be two joint tenants of an advowson, and one presents without the other, this is no usurpation upon his companion. But if the joint tenant who presented dies, it shall serve for a title in a *quare impedit*, brought by the survivor: if one joint tenant presents, or if they present severally, the ordinary may either admit, or refuse such a presentee; unless they all join; and after the six months, he may present by lapse. 1 Inst. 186 b. 2 —— 365.

27. By the common law, where an advowson descends to coparceners, and they cannot agree to present jointly, the eldest sister shall have the first turn, the second the next, and so of the rest, according to their seniority; and this privilege extends, not only to the heirs, but also to the assignees of each coparcener,-whether they acquire a portion of the estate by conveyance, or by act of law, as tenant by the curtesy, who shall have the same privilege by presenting in turn, as his wife would have had, if alive. Coparceners. 1 Inst. 166 b. Plowd. 333. 2 Inst. 365.

28. The estate of an advowson descended to two daughters as coparceners; the church became vacant twice in their time, Buller v. Episc. Exeter, 1 Ves. 340.

[illegible] [illegible] [illegible] [

33. It is laid down by Lord Holt that joint tenants of an advowson may make partition to present by turns; which will divide the inheritance *aliquatenus*, and create separate rights. So that the one shall present in the one turn, and the other in the other; which is a sufficient partition, for partition of the profits is a partition of the thing, where the thing and the profits are the same. It cannot make two advowsons out of one, but it can create distinct rights to present in the several turns. And in this case each of the parties is said to have *advocationem medietatis ecclesiæ*.

Effect of a partition. Ep. Sarum v. Philips. 1 Ld. Raym. 535.

34. By the statute 7 Ann. c. 18. s. 2. it is enacted, "That if coparceners, or joint tenants, or tenants in common, be seised of an estate of inheritance in the advowson of any church or vicarage, or other ecclesiastical promotion, and a partition is or shall be made between them, to present by turns, that thereupon every one shall be taken and adjudged to be seised of his or her separate part of the advowson, to present in his or her turn; as if there be two, and they make such partition, each shall be said to be seised, the one of the one moiety to present in the first turn, the other of the other moiety to present in the second turn. In like manner, if there be three, four, or more; every one shall be said to be seised of his or her part, and to present in his or her turn."

35. Where a person mortgages an advowson, the legal right to present is transferred to the mortgagee; yet he cannot present a clerk of his own choice, whether the advowson be appendant or in gross. For since the presentation is gratuitous, and the mortgagee cannot account for any benefit from it, a court of equity will compel him to present the nominee of the mortgagor.

Mortgagors may nominate.

Amhurst v. Dowling, 2 Vern. 401. Gully v. Selby, Com. Rep. 343.

36. A petition was presented on behalf of a mortgagor, that the mortgagee of a naked advowson might accept of his nominee, and present him upon an avoidance, the incumbent being dead. It was insisted for the mortgagee, that as there was a large arrear of interest, he ought to present, if any advantage accrued from it; and the case in Peer Williams was cited, where the plaintiff's father, being possessed of a 99 years' term of the advowson of Eckington, made a mortgage thereof to the defendant, and in the mortgage deed was a covenant, that on

Mackenzie v. Robinson, 3 Atk. 559.

Gardiner v. Griffith, 2 P. Wms. 404.

every avoidance of the church, the mortgagee should present; in which the Court gave no opinion; but seemed to incline that the mortgagee had a right to present.

Lord Hardwicke was of opinion that the mortgagor ought to nominate; and that it was not presumed any pecuniary advantage was made of a presentation. He observed that these were indifferent securities: but the mortgagee should have considered it before he lent his money; and, instead of bringing a bill of foreclosure, as he had done in this case, should have prayed a sale of the advowson. The next day he mentioned that he was not clear as to this point; and that he had looked into the case of Gardiner *v.* Griffiths, according to the state of it in the House of Lords, where the decree of Lord King was affirmed, and said that was a mixed case; and that he doubted himself whether a covenant, that the mortgagee should present, as was the case there, was not void; being a stipulation for something more than the principal and interest; and the mortgagee could not account for the presentation.

The question was adjourned for farther consideration to the next day of petitions, when the mortgagee not being able to find any precedent in his favour, gave up the point of presenting; and an order was made that the mortgagor should be at liberty to present, and the mortgagee was obliged to accept of the mortgagor's nominee. (*a*)

And tenants by statute merchant. Arundel *v.* Ep. Gloucester, Ow. 49.

37. It was formerly understood that where a manor, to which an advowson was appendant, was extended on a statute merchant; if the church became void during the cognizee's estate, he might present to it. But it is to be presumed that if a case of this kind were now to arise, the cognizor of the statute would be allowed to nominate a clerk to the cognizee; by analogy to the case of a mortgage.

And bankrupts. Wats. 106.

38. It has been held that if a patron of a church is a bankrupt, and the church becomes void before the advowson is sold under the commission, the bankrupt shall present, or nominate (*b*), to the church.

(*a*) [Where the advowson is in trustees they have the legal office of presenting; the *cestuique* trust has the right of nominating to the vacant benefice.—Vide supra, sect 2. note, infra s. 71.]

(*b*) [By the 77 sect. of stat. 6 Geo. 4. c. 16. the assignees of the bankrupt are authorized to execute all powers which the bankrupt could legally execute for his own benefit,

39. With respect to the persons who are disabled from presenting to a church, none but natural-born subjects can exercise this right. Therefore, if an alien purchases an advowson, and the church becomes vacant, the Crown shall have the presentation.

Who are disabled from presenting. Watts. 106.

40. Where a person seised of an advowson is outlawed, and the church becomes vacant while the outlawry is in force, such person is disabled from presenting, and the avoidance is forfeited to the Crown.

41. By the statute 1 Will. and Mary, sess. 1. c. 26. every person who shall refuse or neglect to subscribe the declaration mentioned in an act of that parliament, intituled, "An Act for the better securing the Government, by disarming Papists;" shall be disabled to make any presentation to a benefice. And the chancellor and scholars of the universities of Oxford and Cambridge shall have such presentation. (*c*)

42. By the third section of this statute, the trustees of Roman Catholics are disabled from presenting to any benefice. And by the fourth section, such trustees, by presenting without giving notice of the avoidance to the vice-chancellor of the university, to whom the presentation shall belong, within three months after the avoidance, become liable to a penalty of 500*l.*

43. By the statute 12 Ann. st. 2. c. 14. s. 1. Roman Catholics are disabled from presenting to any benefice; and every such presentation is declared void to all intents and purposes. By the stat. 11 Geo. 2. c. 17. s. 5. every grant made of any advowson or right of presentation, collation, nomination, or donation to any benefice, by any person professing the Catholic religion, or by any mortgagee or trustee of such person, shall be null and void; unless it be for valuable consideration to a Protestant purchaser.

44. [By the recent stat. 10 Geo. 4. c. 7. for relief of his majesty's Roman Catholic subjects, it is provided, sect. 16. that nothing therein contained should extend to enable any person, otherwise than as he was then (13th April, 1829,) by law enabled, to exer-

(except the right of nomination to any ecclesiastical benefice.) As the void turn cannot be sold, it is not assets for the benefit of the creditors.]

(*c*) The presentation to the livings situated south of the Trent belong to Oxford; and those situated north of that river belong to Cambridge.—*Note to former edition.*

cise any right of presentation to any ecclesiastical benefice whatsoever; or to repeal, vary, or alter in any manner the laws then in force in respect to the right of presentation to any ecclesiastical benefice.]

Lunatics.

45. A lunatic cannot present to a church, nor his committee. But the Lord Chancellor, by virtue of the general authority delegated to him by the crown, presents to all livings whereof lunatics are patrons, whatever the value of them may be; generally, however, giving it to one of the family. Doctor Woodeson says this right was first asserted by Lord Talbot, whose example has been followed by all his successors.

Lect. Vol. I. 409.

Examination of the clerk.

46. The right of presentation to an ecclesiastical benefice is but a limited trust, for the bishops are still in the law the judges of the qualifications of those who are presented to them for that purpose. Patrons never had the absolute disposal of their churches, upon their own terms; for if they did not present fit persons, within the limited time, the care of appointing a proper person to fill up the vacant benefice returned to the bishop. And as the law requires that the clerk presented be *idonea persona*, various exceptions may be made to the character and qualifications of the person presented. 1. Concerning his person, if he be under age, or a layman. 2. Concerning his conversation, if it be irregular or criminal. 3. Concerning his ability and sufficiency to discharge his pastoral duty, which belong to the bishop, as the proper ecclesiastical judge; who may and ought to refuse the person presented, if he be not *idonea persona*.

2 Inst. 631.

Specot's case, 5 Rep. 57.

47. It was resolved by the Court of King's Bench in 32 Eliz. that all such as are sufficient causes to deprive an incumbent, are also sufficient causes for refusal of a presentee.

2 Roll. Ab. 356.

48. It is a good cause of refusal of a clerk that he is *simoniacus* in the same presentment; that is, has made a corrupt contract to be presented; or that he is *simoniacus* in another benefice.

Wats. 230.

49. When the bishop refuses without good cause, or unduly delays to admit and institute a clerk to the church, to which he is presented, the clerk may have his remedy against the bishop in the ecclesiastical court.

2 Inst. 631.

50. If the patron finds himself aggrieved by the ordinary's refusal of his clerk, he may have his remedy by writ of *quare impedit*, in the temporal court; and in such case the ordinary must

shew the cause of his refusal, specially and directly; not only that he is a schismatic or a heretic, but also the particular schismatical or heretical opinions with which he is charged must be set forth; for the examination of the bishop does not finally conclude the plaintiff; and without shewing specially, the Court cannot inquire and resolve whether the refusal be just or good. If the cause of refusal be spiritual, the Court shall write to the metropolitan to certify thereof; or if the cause be temporal, and sufficient in law, which the temporal court shall decide, the same may be traversed, and an issue thereupon joined and tried by a jury.

51. It has been determined by the House of Lords that it was a good plea on the part of a bishop, in a *quare impedit*, that the presentee was a person not sufficient or capable in learning to have the church; and that he need not set forth in what kind of learning, or to what degree, he was defective. Ep. Exeter v. Hele, Show. Parl. Ca. 88.

52. As it is of the utmost importance to the public that ecclesiastical benefices should be conferred on those only whose learning and piety qualify them for the duties annexed to such offices; the law has always been extremely careful in watching over those who have advowsons, lest they should be influenced, in the exercise of their right of presentation, by any corrupt or improper motives. It has therefore been established from the earliest times that no pecuniary or other valuable consideration ought, in any instance, to be given or received for procuring a presentation to a church. This offence is called simony in the canon law; the person making a corrupt contract of this kind is called *simoniacus*, and a person thus presented to a church is said to be *simoniacè promotus*. Of simony. 1 Inst. 17 b. 89 a. 3 Inst. 153.

53. By the statute 31 Eliz. c. 6. it is enacted, for avoiding of simony, that if any patron, for any sum of money, reward, gift, profit, or benefit, directly or indirectly, or for or by reason of any promise, agreement, grant, bond, covenant, or other assurance, shall present or collate any person to an ecclesiastical benefice or dignity, such presentation shall be void, the presentee be rendered incapable of ever enjoying the same benefice, and the crown shall present to it for that time only. 6 Bac. Abr. 188. 2 Bar. & Cress. 652. per Best, J.

54. It was formerly held, that if a person who had acquired a benefice by simony, enjoyed it during his life, the king might present after his death, because the church, notwithstanding the Wats. 96.

institution and induction of the simonist, remained void to the king's presentation, before his death; and his death could not make him incumbent that was none before, or otherwise alter the case. But now, by the statute 1 Will. & Mary, c. 16., it is enacted, that if a person simoniacally presented shall die without being convicted of such simony in his lifetime, such simoniacal contract shall not prejudice any innocent patron or clerk on pretence of lapse to the crown, or otherwise.

Procuring a presentation for money.

3 Inst. 156.

55. The first kind of simony under the statute 31 Eliz. is where any sum of money, gift, reward, profit, or benefit, is given or promised, directly or indirectly, for procuring a presentation to a benefice. And Lord Coke observes that simony is the more odious, because it is ever accompanied with perjury; for the presentee is sworn not to commit simony.

Wats. 43.

56. If a clerk seeks to obtain for money a presentation to a void church, though afterwards the patron present him *gratis*, yet this simoniacal attempt disables him from taking the benefice; being deemed an unfit person to hold it, for having at any time been capable of intending to obtain it corruptly.

Idem 37.

57. If a patron promises a clerk that in consideration of his marrying his daughter or kinswoman he will present him to a living when void, this is a simoniacal contract.

Byrte v. Manning, Cro. Car. 191.

58. But where A. covenanted that B. his son should marry C. the daughter of D., in consideration of which D. covenanted to advance 300*l.* for his daughter's portion; and A. covenanted to settle certain lands on his son and his intended wife. There were likewise covenants on the part of A. for the value of the lands, and for quiet enjoyment; and a covenant on the part of D. to procure a certain benefice for B. on the next avoidance. It was held that this was not a corrupt contract, it not being a covenant in consideration of the marriage, but a distinct and independant covenant, without any apparent consideration.

Baker v. Mounford, Noy, 142.

59. A reservation of a profit to a stranger, as an annuity to the widow or son of the last incumbent, does not appear to be within the statute 31 Eliz., though Doctor Watson doubts it: but it is perfectly clear that a reservation of any kind of profit, in favour of the patron, is within the statute.

Hutchinson's case, 12 Rep. 101. Id. 74. 3 Inst. 154. Cro. Eliz. 789.

60. It was resolved by all the judges, in 8 Jac. 1., that if any should receive or take money, fee, reward, or other profit, for any presentation to a benefice with cure, although in truth he which

is presented be not knowing of it, yet the presentation, admission, and induction, are void, by the express words of the statute 31 Eliz., and the king shall have the presentation *hac vice*. For the statute intends to inflict punishment upon the patron, as upon the author of this corruption, by the loss of his presentation; and upon the incumbent who came in by such a corrupt patron, by the loss of his incumbency, although that he never knew of it. But if the presentee be not cognizant of the corruption, then he shall not be within the clause of disability in the same statute.

61. In a writ of error to reverse a judgment, whereby the king had recovered upon a title of simony, which was, that a friend of the clerk had agreed to give a sum of money to J. S., who was not the patron, to procure the clerk to be presented to a church, who was presented accordingly. Rex v. Trussel, 1 Sid. 329. 2 Keb. 204.

It was assigned for error, that it did not appear that either patron or clerk were acquainted with the agreement. But the Court said, the clerk was *simoniacè promotus*. And it was said that Doctor Duxon had enjoyed the church of St. Clements above twenty years by such a title of the king's; the presentee of the patron being ousted, by reason of a friend's having given money to a page of the earl of Exeter, to endeavour to procure the presentation; and neither the earl nor the clerk knew any thing of it.

62. [In the case of Fox *v.* Bishop of Chester, it was decided that a contract for the sale of the next presentation, the parties knowing the incumbent to be at the point of death, was simoniacal; and the presentation made in pursuance of it void; although the clerk presented was not privy to the transaction, and the contract was not made with a view to the presentation of any particular individual. But this decision was reversed upon a writ of error in the House of Lords, June 3, 1829.] 2 Bar. & Cress. 635. See also Cro. Eliz. 685. Hob. 165. 19 Vin. Abr. 458. 6 Bing. 1.

63. The second kind of simony is where the right of presenting is sold at the time when the church is vacant. This was also held to be void at common law, because during the vacancy of the church, the right of presenting was but a chose in action, which could not be transferred. Sale of the presentation during a vacancy.

64. A patron of an advowson, the church being void, granted to B. *proximam presentationem* to the said church, *jam vacantem, ita quod liceat B. hac vice ad dictam ecclesiam presentare*. And Stephens v. Wall, Dyer, 282 *b*. Jenk. Cent. 6. Case 13.

it was resolved, by all the judges of England, that the grant was void; for the present avoidance was a thing in action and privity, and vested in the person of the grantor.

Benloe, 192.

65. A lease of an advowson, granted after the church became vacant, was adjudged void, as to the immediate presentation.

Amb. 268.

And it is said by Lord Hardwicke, that the sale of an advowson during a vacancy was not within the statute of simony, as a sale of the next presentation was; but was void by the common law.

Ep. Lincoln *v.* Wolforstan, 1 Black. R. 490. 2 Wils. R. 174. 3 Burr. R. 1512.

66. In a modern case, the Court of King's Bench resolved that a grant of a next presentation, or of an advowson, made after the church was actually fallen vacant, was a void grant, *quoad* the fallen vacancy. Lord Mansfield and Mr. Justice Wilmot said, the true reason why a grant of a fallen presentation of an advowson, after avoidance, is not good, *quoad* the fallen vacancy, is the public utility, and the better to guard against simony; not for the fictitious reason of its being a chose in action. And it was held in the same case, that a grant of a presentation, after institution of the incumbent to a second living which vacated the first was void, because the church was considered as vacant from the time of institution.

Leak *v.* Ep. Coventry, Cro. Eliz. 811.

67. If the patron sells the fee simple of the advowson after the avoidance, neither he nor his vendee can have a *quare impedit*, because the avoidance makes it a chose in action, so that it does not pass to the grantee; and the grantor has destroyed his action by his conveyance, so none can have it.

Walker *v.* Hammersley, Skin. 90.

68. If a presentation be made by a person usurping the right of patronage, and pending an action for removing his clerk, who is afterwards removed, the benefice is sold; this is an offence within the meaning of the statute, for the church was never full of that clerk. And if this were allowed, the statute might be eluded; for it would be only getting an usurper to present while the church was void, and then selling it.

Sale of the next presentation good.

69. Where a person purchased the next presentation to a benefice, the church being then full, with an intention to present a particular person, a subsequent presentation of that person was formerly deemed simony. But it is now an universal practice to purchase the next presentation to a living, the church being full; and there is no modern instance where a presentation under such circumstances has been questioned.

70. It is well settled that a purchase of the next *presentation* to a church, when the incumbent is in a dying state, is simony: but it was determined, in the following case, that a purchase of an *advowson* in fee simple under these circumstances, was not simony.

Cro. Eliz. 685. Hob. 165. 19 Vin. Abr. 458. 2 Bar. & Cress. 635. Supra, s. 62.

71 The plaintiff Barrett, having notice that the incumbent of a living was on his death-bed, and that it was uncertain whether he would live over the night, purchased the advowson in fee of the defendant. The incumbent died the next day, and the purchaser presented his clerk upon that avoidance. A question was referred by the Court of Chancery to the Court of Common Pleas, whether the said presentation was void, as being on a simoniacal contract.

Barratt *v.* Glubb, 2 Black. R. 1052.

Serjeant Hill argued for the plaintiff that this was no simony, being the sale of an advowson in fee, before an actual vacancy; that simony was properly defined a presentation in respect of reward; that the statutes of simony being penal, and restrictive of the common law, ought therefore to be construed strictly; that fraud or simony ought not to be presumed or intended.

Serjeant Glyn for the defendants insisted that the common law, previous to any statute, took notice of corrupt presentations, as contracts *ex turpi causâ;* that no profit was allowed to be made of a right of patronage; that a purchase made with an intent to present a particular person was simoniacal; and the laws against simony, when they merely vacated the presentation, were considered as remedial, and construed largely; when they inflicted a forfeiture, as penal, and construed strictly.

Lord Chief Justice De Grey said, he was not able to doubt upon the question. An advowson was a temporal right; not indeed *jus habendi,* but *jus disponendi.* The exercise of that right was by presentation. The right itself was a valuable right; therefore, an advowson was held to be assets in case of lineal warranty. It was real assets in the hands of the heir; and the trustee or mortgagee of an advowson was bound to present the clerk of the *cestui que trust,* or mortgagor. Thus far it was a valuable right, and properly the object of sale: but the exercise of this right was a public trust, therefore ought to be void of any pecuniary consideration, either in the patron or the presentee. It could not, it ought not, to produce any profit.

Ante, c. 1.

It was not vested in a guardian in socage, nor was he accountable for any presentation made during the infancy of his ward.

Simony was unknown to the common law, though corrupt presentation was. But what was or was not simony depended on the statute of 31 Eliz., which did not adopt all the wild notions of the canon law, but had defined it to be a corrupt agreement to present. No conveyance of an advowson could be affected by that act, unless so far as it affected the immediate presentation; therefore a sale of an advowson, the church being actually void, was simoniacal and void in respect to the then present vacancy. But it had never been thought, that to purchase an advowson merely with the prospect, however probable, that the church would soon become void, was either corrupt or simoniacal; though by the common law, if a clerk or a stranger, with the privity of the clerk, contracted for the next avoidance, the incumbent being *in extremis*, it was held to be simoniacal.

Greenwood v. Ep. of London, 5 Taun. 727.

The present case was the purchase of an advowson in fee. No privity of the clerk appeared. The church was not actually void, but in great probability of a vacancy; which, however, was by no means equivalent to a certainty. He said the judges would go beyond every resolution of their predecessors, to determine this to be simony. Suppose this had been the purchase of a manor, with the advowson appendant, and the incumbent lying *in extremis*, what must be done in the present case was simony. Must the Court have declared the appendancy to be severed, or that the whole manor was puchased corruptly, for the sake of the advowson?

The other judges concurred; and the Court certified that the presentation was not void, it not appearing to them to have been made upon a simoniacal contract.

Exception.

72. It was formerly doubted whether it was simony for a clerk to purchase for himself the next presentation to a benefice, while it was full, and to be presented thereto, when it became void. To put an end to this doubt, the statute 12 Ann. c. 12. enacts, "That if any person shall, for money, reward, gift, profit, or advantage, or for or by reason of any promise, agreement, grant, bond, or other assurance, of or for any money, reward, gift, profit, or benefit, directly or indirectly, in his own name, or in the name of any other person or persons, take, procure, or accept the next

avoidance or presentation to any benefice, &c., and shall be presented or collated thereupon, that every such presentation or collation shall be utterly void and of no effect in law; and such agreement shall be deemed to be a simoniacal contract; and it shall be lawful for the queen's majesty, her heirs and successors, to present or collate unto such benefice, &c. for that time or turn only. And the person so corruptly taking, procuring, or accepting such benefice, &c. shall, from thenceforth, be adjudged a disabled person to have and enjoy the same, and shall be subject to any punishment, pain, or penalty prescribed or inflicted by the laws ecclesiastical, in like manner as if such agreement had been made after such benefice, &c. had become vacant.

73. It has been doubted whether the purchase of an advowson in fee by a cleygyman, and a presentation of himself upon the death of the incumbent, be within this statute. It appears, from an opinion of the late Mr. Fearne, that he did not consider such a purchase as prohibited by that statute, and that a presentation by a trustee of such a purchaser, of the purchaser himself, might be made. This opinion is supported by Lord Chief Justice De Grey's argument in the case of Barrett *v.* Glubb, in which he distinguished between a purchase of the next presentation to a church, and a purchase of an advowson in fee; for, in the first case, he admitted that a purchase would be simoniacal, if the incumbent was *in extremis;* whereas in the in the second case he held it good.

Cases and Opinions, 409.

Ante, s. 71.

Vide Paley's Philosophy. B. III. c. 20.

74. An incumbent of a living may resign it to the ordinary; or if it be a donative, to the patron, in which case it becomes vacant.

Resignation, 3 Burn. Ecc.L. 302.

75. A collateral condition cannot be annexed to a resignation, the words being *pure sponte absolute et simpliciter*, in order to exclude all indirect bargains, not only for money, but for any other valuable consideration; except it is made for effecting an exchange, in which case it admits of this condition, *viz.* that the exchange shall take full effect.

Idem.

76. A resignation of a benefice is not valid until it is expressly accepted by the ordinary, and it has been long settled that the ordinary may refuse a resignation.

Idem 305.

77. By the 31 Eliz. c. 6. s. 8. it is enacted, that if any incumbent of any benefice with cure of souls shall corruptly resign or exchange the same, or corruptly take for or in respect of the

resigning or exchanging the same, directly or indirectly, any pension, sum of money, or other benefit whatsoever; as well the giver as the taker of any such pension, sum of money, or other benefit corruptly, shall lose double the value of the sum so given, taken, or had; half to the queen, and half to him that shall sue for the same in any of her majesty's courts of record.

Bonds of resignation.

78. It has been long a common practice for patrons, when they present a clerk to a living, to take a bond from him in a sum of money, conditioned either to resign the living in favour of a particular person, as a son, relation, or friend of the patron, whenever such son, &c. becomes capable of taking the living, or else to resign generally, upon the request of the patron. In the first case they are called special bonds of resignation, and [until a recent determination (*a*) which will be noticed in a subsequent section, a very general opinion prevailed that they were] valid. In the second case they are called general bonds of resignation; and were never approved of by the bishops, though in some cases held to be valid by the courts of law and equity. But whenever they were used for the purpose of obtaining any pecuniary anvantage from the person presented, the Court of Chancery always interposed and granted an injunction against them.

Johns *v.* Lawrence, Cro. Jac. 248. 12 Mod. 504. 1 Eq. Ca. Abr. 86. Str. 534.

Babington *v.* Wood, Cro. Car. 180. 3 Bing. 506. Durston, *v.* Sandys. Hilliard *v.* Stapleton, 1 Ab. Eq. 86.

Compl. Incumb. 30.

79. Dr. Watson observes that general bonds of resignation did not find any encouragement from the Court of Chancery, which relieved the incumbent; and would not oblige him to resign, or to pay the penalty of the bond, unless some special cause were shewn and made out by the patron that he was unqualified to hold the living, or guilty of some immorality or irregularity, which was a sufficient cause of deprivation; or at least that he was non-resident, and neglected his duty. But in the following case it was determined by the House of Lords, that where a clerk, upon being presented to a living, entered into a general bond to the patron to resign whenever the patron should require him, such bond was absolutely void.

Ep. London *v.* Fytche, 2 Bro. Parl. Ca. 211. Dashwood *v.* Peyton, 18 Ves. 27—37.

80. The rectory of the parish church of Woodham Walton, in the diocese of London, becoming vacant, Mr. Fytche, the patron, presented his clerk, the Rev. Mr. Eyre, to the bishop, for institution. The bishop being informed that Mr. Eyre had given his patron a bond in a large penalty, to resign the said rectory

(*a*) [Fletcher *v*, Lord Sondes, 3 Bing. 501. Infra, s. 84.]

at any time upon his request, and Mr. Eyre acknowledging that he had given such a bond, the bishop refused to institute him to the living. Mr. Fytche brought a *quare impedit* against the bishop, to which he pleaded two pleas:—1. That the living was a benefice with cure of souls, and that the clerk had given a bond to the patron in the penalty of 3,000*l.* to resign at any time upon the request of the patron; whereby the presentation became void in law. 2dly, That the living was a benefice with cure of souls, and that for the purpose of investing the patron with an undue influence over the clerk, it was agreed that the clerk should, in consideration of the presentation, become bound to the patron in a bond as aforesaid; which was accordingly done.

Mr. Fytche demurred to both these pleas. The bishop having joined in demurrer, judgment was given by the Court of Common Pleas for the patron, and affirmed by the Court of King's Bench.

Upon a writ of error in the House of Lords, it was contended on the part of the bishop, that although there were several adjudged cases upon the subject of general bonds of resignation, none of them had arisen in the same form, or between parties acting in the same capacity, and other circumstances similar to the present; therefore they ought not to be considered as precedents by which this case was to be determined. That the bishop or ordinary was authorized by law to judge in the first instance of the fitness or unfitness of the person presented to him for institution; and the appellant had, in this instance exercised his authority according to law. That it was in the power of the patron, by means of a general bond, to establish two modes of selling a vacant living, which was simony; either of which was equally certain and infallible. 1. The parties might make the penalty in the bond adequate to the price of the living. The presentee, when instituted, might refuse to resign, and pay the penalty without any suit; or might make known execution of the bond, and then tender resignation to the bishop; which the bishop, under those circumstances would probably refuse. Upon his refusal, the bond might be put in suit: and thus, also, by a circuity, the penalty might be paid as the price of the living.

The second mode of selling a living which was vacant, through the medium of a general bond of resignation, was equally obvious and practicable. The penalty of the bond of resignation might

be made excessive, much above the real value of the living; the patron might, during the incumbency of the presentee, who executed the bond to resign, sell the next turn or right of presentation at an advanced price, and after such sale require the incumbent to resign in terms of his bond. By this means the first presentation would be fictitious; and the sale of the second presentation, though made under the pretence of selling a right of presentation to a full benefice, would in reality be the sale of a vacant living. That a general bond to resign put the person who entered into such bond under the power of the lay patron, instead of being under the authority of the bishop, to whom he swears canonical obedience; and whom by law he was obliged to obey; and was thus, contrary to good policy, creating an influence which tended to subvert ecclesiastical discipline and subordination. That general bonds of resignation were contrary to law, by altering the tenure of the office of a beneficial clergyman; for every benefice being an office for life, the patron could grant it only for life. He could not grant it for years, he could not grant it at the will of himself, for such grant in direct terms would be void as contrary to the very tenure of the office. Where there was a general bond of resignation entered into, the same alteration of the tenure was effected by circuity. The patron granted, and the presentee accepted, at the will of the patron, that benefice, which the law intended to be conferred and holden for life.

That although a court of equity would grant relief, in case the patron made an improper use of a general bond to resign; yet, from the extreme difficulty of discovering the real purpose for which it was used, it could seldom be possible to procure such relief; or to guard, by that means, against the consequences that follow from such bonds being tolerated. The bad purpose not being discovered, could not be prevented but by a solemn decision, that general bonds of resignation were illegal. That a general bond of resignation puts it in a great measure in the patron's power to convert a part of the profits of the living to his own use, and absolutely puts it in the power of patron and incumbent together to make such partition of them as they can agree upon, whereby the revenues of the church may be alienated: and that a general bond of resignation was an assurance of profit or benefit to the patron; and therefore contrary to

the statute 31 Eliz. c. 6., and inconsistent with the oath of simony.

On behalf of the defendant in error it was said that this was a new attempt to question the settled law of the land; namely, whether a bond given by the presentee to the patron, with a condition to resign upon request, which was termed a general resignation bond, simple and unattended with any other fact or circumstance, was corrupt, simoniacal, and against the statute of Elizabeth. This had been questioned and repeatedly determined in Westminster Hall to be legal, and not simoniacal; and it was looked upon to be so well settled and established, that in Hesketh *v.* Gray, 28 Geo. 2. the Court would not suffer the counsel to argue against the validity of such a bond. But such a bond might be abused; it might be corrupt, simoniacal, and against the statute; it might be given upon a preceding stipulation of gain, &c.; or after it was innocently given, it might be used by the obligee for the purpose of withholding tithes, or deriving some pecuniary advantage to himself. And if there were only grounds to suspect such practices, a bill might be filed for a discovery; and it was admitted that when such illegal facts were alleged and proved, such a bond could not be enforced in a court of justice. But the courts of justice never interfered with possibilities. They never interfered but when such abuse appeared, and was specified and alleged in the pleadings, in order to be proved if denied. That the bishop in this case was precisely in the same predicament with the clerk in all the other cases. He had the same advantage of filing a bill for a discovery of such illegal fact, and of pleading it, when he had so discovered it; and he had it in the present case.

But the bond in the present case was a mere simple resignation bond, unattended with any such illegal circumstance; every such circumstance, suggested by a bill for a discovery, had been denied; no such abuse was specified in the first plea; and therefore the cause therein alleged by the bishop was not sufficient for him to refuse the clerk. That the same reasoning might be applied to the second plea,—the possible abuse of such a bond; *viz.* that he would have acquired, and had undue influence, power, and controul over the clerk, if he had admitted him; so also as to the unfitness of the clerk. But in order for the courts to interfere, the undue influence must have happened;

it must then be specified and alleged in the plea, in order for the court of justice to interfere: the unfitness in like manner must be specified and alleged, in order to be proved. But the bond in the present case was unattended with any such circumstance; and therefore neither any undue influence or unfitness was specified in the second plea to have attended the presentation; consequently the cause here alleged was not sufficient for the bishop to refuse the clerk.

As to the propriety of specifying the unfitness, it might be observed that the judgment of the bishop was subject to review; he could not refuse *ad libitum*, he must assign his cause of refusal; for every fact of unfitness might be questioned, and tried in a temporal court, except literature; and that was subject to the review of the metropolitan. Upon the whole, there was no fact alleged in the pleadings of illegal use in giving the bond; or of undue influence or unfitness in the clerk to be admitted, &c.; besides the mere naked giving of the bond; wherefore it was hoped the judgment of the Court of King's Bench would be affirmed.

After hearing counsel on this case, several questions were put to the judges; seven of whom were of opinion that the bond was good and valid; and the eighth, (Mr. Baron Eyre) that it was illegal. A debate and division of the house ensued, when there appearing to be for reversing the judgment nineteen, among whom were all the bishops present, and against it eighteen; it was ordered that the judgment given in the Court of King's
30 May, 1783. Bench, affirming a judgment given in the Court of Common Pleas, should be reversed.

81. In consequence of this determination, general bonds of resignation were deemed illegal and void. But the courts of law did not seem disposed to condemn bonds of resignation, unless they are exactly similar to that which was held unlawful in the above case; for in a subsequent case the Court of King's Bench held that a bond by which a clerk shall only bind himself to the performance of those duties which the rules of law, and the principles of morality require, is valid, and will be enforced.

Bagshaw *v.* Bossley, 4 T. R. 78. 82. A bond was given by a clerk to a patron to reside on the living, or to resign if he did not return after notice; and also not to commit waste on the parsonage.

In an action of debt on this bond, the question was, whether it was valid or not.

Lord Kenyon.—" I cannot bring myself to entertain a doubt on this case. It has been argued that the patron's right of presentation is a mere trust; it is so to some purposes, but not to all. It is a trust coupled with an interest; for it is a subject of conveyance with a valuable consideration, which is not the case with a naked trust. As soon as the defendant was presented to the living, he was bound to take upon himself all the duties of an incumbent, to reside on the living, to take upon him the cure of souls, and to keep the house in proper repair. Now this bond was entered into for the purpose of securing a performance of all those duties, which by law, and without the bond, he was bound to discharge. I avoid saying any thing respecting the case of the bishop of London *v.* Fytche; when that question comes again before the House of Lords they will, I have no doubt, review the former decision, if it should become necessary. It is sufficient for me, in deciding the present case, to say, it cannot be governed by that. For here the plaintiff does not call for the resignation of the incumbent; but merely for a performance of those duties, which in morality, religion, and law, he ought to do. I am therefore clearly of opinion that a bond for the performance of these duties is not illegal."

Mr. Justice Buller—" I cannot find any immorality or illegality in this bond. It is the duty of an incumbent to reside on his living, and to be regular in the discharge of his duty. Now this bond requires nothing more: it only requires him to do what the law would have compelled him to do without it."

Mr. Justice Grose was of the same opinion, and judgment was given for the plaintiff.

83. In a subsequent case, where a clerk had given a bond to the patron on the presentation, on condition to reside on the living; and to resign, if the patron's son became capable and desirous of taking the living; and also to keep the rectory-house and chancel in repair: The Court of King's Bench, in an action of debt on this bond, understanding that it was intended to carry the case up to the House of Lords, gave judgment for the plaintiff, without any argument; saying, that as this was not precisely similar to the case of the Bishop of London *v.* Fytche, they were bound by the established series of precedents.

Partridge *v.* Whiston, 4 Term R. 359.

It does not appear that this case was ever carried to the House of Lords.

3 Bing. 501. Newman *v.* Newman, 4 Maule & Sel. 70, 71.

84. [Until the recent case of Fletcher *v.* Lord Sondes, decided on appeal in D. P., a very general opinion prevailed, that although, according to the case of Bishop of London *v.* Fytche, bonds and other assurances for *general* resignation were void, yet they were valid when given for securing the resignation of ecclesiastical preferments in favour of specified individuals. The former case, however, decided that for either of those purposes such bonds, &c. were void; and, in consequence of this previous misapprehension of the law, many bonds and other assurances had been entered into for the purpose of special resignation, and many presentations and inductions made accordingly. In order, therefore, to remedy the inconveniences that might result from the above decision, the statute of 7 & 8 Geo. 4. c. 25. was immediately passed: and subsequently the 9 Geo. 4. c. 94. rendered valid bonds, covenants, and other assurances made for the resignation of ecclesiastical preferments, in favour of one individual named in such bond, &c. or to any one or two individuals therein named, being within the degrees of relationship (by blood or marriage) to the patron specified in the act.]

3 Bing. 523.

TITLE XXII.

TITHES. (a)

SECT. 1. *Origin and Nature of.*
6. *Different Kinds.*
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14. *Predial Tithes.*
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32. *Hops.*
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36. *Agistment Tithes.*
42. *Mixed Tithes.*
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71. I. *A Real Composition.*
75. II. *Prescriptions* De modo decimandi.
77. III. *Or* De non decimando.
85. IV. *Act of Parliament.*
86. *Non-payment of Tithes cannot be pleaded against a lay Rector.*
92. *But long possession of a portion of Tithes creates a title.*

SECTION I.

Origin and nature of.

DURING the first ages of Christianity, the clergy were supported by the voluntary offerings of their flocks: but this being a precarious existence, the ecclesiastics in every country in Europe, in imitation of the Jewish law, claimed, and in course of time established, a right to the tenth part of all the produce of lands. This right appears to have been fully admitted in England before the Norman conquest, and acquired the name of tithe from a Saxon word signifying *tenth*.

2. Tithes may be described to be a right to the tenth part of the produce of lands, the stock upon lands, and the personal industry of the occupiers. They were originally a mere ecclesiastical

(a) Nothing more than a general outline of the law of tithes is here attempted, and that only as far as relates to lay impropriators.—*Note to former edition.*

[illegible]

[illegible]

[illegible]

called in the canon law *prædium*, whether it was arable, meadow, or pasture, the fruit or produce thereof is called predial. Nor is any allowance made for the trouble and expense of raising any species of vegetable which yields tithe. Mixed tithes are those which arise not immediately from the profit of the land; but from the produce and increase of animals nourished by the land. Personal tithes are the profits which arise from the labour and industry of man, in some trade or employment; being the tenth of the clear profits, after deducting all expenses.

7. Tithes are again divided into great and small. Where the tithe of any thing is *magnus ecclesiæ proventus*, it is reckoned among the great tithes; where it is *parvus ecclesiæ proventus*, it is reckoned among the small tithes. Thus the tithes of corn, hay, and wood, are great tithes, because they are in general of much greater value than any other species of tithes. The predial tithes of other less valuable vegetables, such as hops, potatoes, madder, woad, together with mixed and personal tithes, are small tithes.

8. It was formerly doubted whether the distinction between great and small tithes arose from the nature of the vegetable, or from the quantity of it in any particular parish. But it is now settled that the quantity of any particular vegetable raised in a parish cannot alter the nature of the tithe; for in that case, corn and hay might in some parishes be a small tithe; and, in conformity to this principle, Lord Hardwicke held, that the tithe of potatoes, though sown in great quantities in common fields, was a small tithe.

Norton v. Clark, Gwill. 428.

Smith v. Wyatt, Gwill. 777.

9. This doctrine has been confirmed by a determination of Lord Henley, who held that tithes are by law denominated and adjudged to be great or small according to the nature of the vegetable; not from the mode of cultivation, or the use to which it was applied.

Simms v. Bennett, 7 Bro. Parl. Ca. 29. 1 Eden, 382.

10. Predial tithes, consisting of the immediate produce of the land, are due of common right, it being a principle of law that all lands ought to pay tithes. But mixed and personal tithes are only due by custom; therefore, unless they have been usually paid, they are not demandable.

How and when due. 11 Rep. 15. a.

11. It was formerly held that tithes were only payable of such things as yield an annual increase: but this rule has been deviated from, in the case of some vegetables, which produce a crop

only every second or third year; and in the case of underwood or coppice, which is only cut once in seven or ten years.

2 Inst. 651. Bunb. 10. 314.

12. It was also formerly held that tithe was only due once in the same year: but it has been determined in two modern cases, that if divers crops are grown on the same land, in the same year, tithe is payable of each of them.

2 Gwill. 562.

13. It has also been resolved in several cases, that no tithe is due of that which produces another titheable substance: but this rule has also been deviated from in modern times.

Predial tithes. 1 Gwill. 429.

14. With respect to predial tithes, it is a general rule, *quod quicquid oritur ex prædio ejusdem sunt prædiales.* Of these predial tithes, some are *fructus naturales*, which grow naturally, without the industry or labour of man, as grass, &c. and others are *fructus artificiales vel industriales*, to the growth of which industry and labour are requisite, as corn, &c. The tithes of these are called *decimæ provenientes*, and *decimæ fixæ*, because they arise *ex fructibus stirpis in terrâ fixæ.*

Corn and other grain.

15. Corn is a predial tithe, of which the tenth cock, shock, or sheaf is due to the parson, where the custom of the place is not otherwise. But no tithe is due for the rakings of corn involuntarily scattered, unless where the rakings are of great value, or are left on the land, covinously, in which cases tithe is payable for them.

2 Inst. 651. 12 Mod. 235. Gwill. 477. 562. 6 Bar. & Cress. 543.

Gwill. 477.

16. It is laid down that no tithe is payable for stubble:—1st, Because the corn is titheable, which is the principal, and the stubble is of no value; 2d, Because, in the case of stubble, there is no second renewing. And in a subsequent case, it was held that stubble used partly for fodder, and partly for manure, was not titheable; the whole of it being used in husbandry. But that this did not extend to a farmer, who left an unusual quantity of stubble, in order to make a fraudulent profit of it.

Id. 1438.

Austin *v.* Nicholas, Gwill. 615. Nicholas *v.* Ellliot, Bunb. 19.

17. Every other species of grain, such as beans, peas, &c., cultivated for sale, are titheable; and whether they are set, drilled, sown, or planted in rows; in a garden-like manner, they are small tithes; but in some cases peas and beans have been considered as a great tithe.

Hay. Cro. Jac. 47. 9 Vin. Ab. 13.

18. Hay is subject to the payment of tithe, notwithstanding that beasts of the plough or pail, or sheep, are fed therewith. It was also formerly held that a right to the tithe of hay accrued

upon the mowing of the grass, and that the application of it, either while it was in grass; or after it was made into hay, to the feeding of beasts of the plough or pail, did not take away the right to tithe. But it has been held in subsequent cases that if a person cuts grass, and while it is in the swarth carries it and feeds his plough cattle therewith, not having sufficient sustenance for them otherwise, no tithe is due thereof. (*a*)

Crawley *v.* Wells, 1 Roll. Abr. 645. Collyer *v.* Howse, Anst. 481.

19. It is laid down in several cases that tithe is not due of aftermath, because it was formerly held, that tithe could only be due once in the same year, from the same ground. But in 33 Cha. 2. the Court of Exchequer was of opinion that, of common right, tithes of aftermath, or of the after-crop of grass mowed, there being no prescription or custom against or in discharge of the same, ought to be paid. And Doctor Burn says, the modern determinations have been that the aftermath of meadow is part of the increase of the same year, and consequently titheable.

Margetts *v.* Butcher, Gwill. 531.

20. Clover, saintfoin, and ryegrass, being considered as a species of hay, are titheable. A second crop of clover is also titheable, as well as the first; and the tithe of this kind of hay belongs to the person entitled to that of common hay, and is therefore a great tithe. Tares and vetches are also titheable, unless they are cut green, and given as food to milch kine, and horses employed in husbandry.

Wallis *v.* Pain, Gwill. 755.

Bunb. 279. Gwill. 679. 1504.

21. By the stat. 45 Edw. 3. c. 3. it was enacted that great or grosse wood of the age of twenty, thirty, or forty years, or upwards, should not be titheable; but that *sylva cædua*, or underwood, should be titheable. Lord Coke says two doubts arose on the construction of this act; first, what should be said great wood, to which the answer was, that in this act the word *grosse* signified such wood as had been, or was, either by common law, or custom of the country, timber; for the act did not extend to other woods, that had not been, or would not serve for timber, though they were of the greatness or bigness of timber. So that oak, ash, and elm, were included within the words great wood; and so was beech, horsebuck, and hornbeam; because they served for building or reparation of houses, mills, cottages, &c., contrary to the opinion of Plowden, 470, which the Court, upon

Underwood.

2 Inst. 642. 3 Rep. 12.

Tit. 3. c. 2.

Soby *v.* Molins.

(*a*) [The law does not dispense with the tithe of the rakings of hay as it does of corn. Bearblock *v.* Tyler, Jacob, C. R. 560. See also 3 Sim. 316.]

2 Inst. 643. deliberate advice, held not to be law. Secondly, of what age those *grosse* or timber trees should be; the statute resolved this doubt in these words:—"Great wood of the age of twenty years or upwards." Which point was also declaratory of the common law.

22. Tithe is in general due of beech, birch, hazel, willow, sallow, alder, maple, and white-thorn trees, and of all fruit trees, of whatever age they are; because the wood of these trees is not usually employed as timber. But if any of these trees have been used as timber, they are not titheable.

Walton v. Tryon, Gwill. 827. 23. In a case where tithe was demanded of beech of above twenty years' growth, Lord Hardwicke said, this depended on the question of fact, whether beech was timber by the custom of the country; and that the issue should be whether, by the custom, beech growing within the parish of M. were, and had used to be deemed timber.

2 Inst. 651. Gwill. 562. 24. It is said by Lord Coke, that no tithes shall be paid of *sylva cædua* employed in hedging, or for fuel, or for maintenance of the plough or pail. In a subsequent case it was determined, that where a person cut down underwood, for the purpose of fencing his own corn, it was not titheable. But a custom that underwood cut and used for fencing of corn generally, whereof tithes were payable, and not sold or otherwise disposed of, should be discharged from the payment of tithes, was held void.

Croucher v. Collins, Gwill. 1576.

Smith v. Williams, Gwill. 608. 25. This doctrine has however been contradicted in a case where, on a bill brought for tithes of wood, the defendant said he felled yearly, at ten years' growth, five acres of wood, worth twenty-five shillings an acre, which he used in mending his hedges, and upon his land; so was of no profit to him. But decreed to account.

Ford v. Racster, 4 M. & S. 130. (a) 26. Oak wood of more than twenty years' standing, not growing from acorns, but from old stools, which belonged originally to trees which had stood more than twenty years, were held not to be so clearly entitled by stat. 45 Edw. 3. c. 3. to exemption from tithe, as to make a verdict which subjected them to tithe a wrong verdict.

Anon. Gould. R. 93. 27. Tithe is not due of *sylva cædua* used in making or repair-

(a) See Aubrey v. Fisher, 10 East. 446. and Rex v. Inhabitants of Merfield, 10 East. 219. Rex v. Inhabitants of Ferrybridge, 1 B. & C. 375.

ing carts or ploughs, to be employed in husbandry, in the parish wherein the wood grew; because by the use of carts and ploughs the tithe of other things is increased.

28. If the tithe of hops and the tithe of wood are both due to the same person, tithe is not due of *sylva cædua* used in poling the hops; because the tithe of the hops is increased by the use of the poles. Anon. Bunb. 20.

29. By the common law, tithe is payable of wood employed in the house for fuel: but there may be a custom, that it is not titheable. Gwill. 828. 969.

30. Where trees are considered as timber, either by common law, or by custom, no tithes are to be paid of the lops or tops of such trees, for whatever use they are cut; with this exception, that in certain peculiar cases, where a fraud is actually attempted, or from necessity to avoid fraud, they may be titheable. (*a*) Walton *v.* Tryon, Gwill. 327.

31. Hemp and flax are titheable: but, to encourage the growth of these articles, it is enacted by the stat. 11 & 12 Will. 3. c. 16. that every person who shall sow any hemp or flax shall pay to the parson, vicar, or impropriator yearly, the sum of five shillings, and no more, for every acre of hemp and flax so sown, before the same is carried off the ground. Madder is titheable in the same manner. Hemp, flax, and madder.

32. Hops are titheable, and accounted among small tithes: the tenth of this vegetable is to be paid after they are picked, and before they are dried. Hops. Knight *v.* Halsey, 8 Bro. Parl. Ca. App.

33. Turnips are also titheable when severed; though there be more crops than one in the year. Thus, in a bill for tithe of turnips, the defendant insisted that no tithe was due for turnips sown after corn the same year; and that he ought not to pay tithe for any crop or profit of arable land, the same year that the parson received tithe-corn from the same ground: but the tithe was decreed. [The tithe of potatoes arises only when they are dug up, and not on the preparatory step of "boughing out." Bearblock *v.* Hancock, 2 Car. & Pay. N. P. 425; see also 2 Hagg. 495.] Turnips. Gwill. 606.

(*a*) [In Chichester *v.* Sheldon, 1 Turn. 245. it was decided that wood springing from the roots or stools of trees is titheable, and neither its own age nor the age of the trees from the roots or stools of which it sprung, will exempt it. See also 1 Yo. & J. 262. Willis *v.* Stone.]

Garden plants. 3 Burn. Eccl. Law, 466. Fanshawe v. Brittain, 2 Yo. & Jer. 575.

34. All garden plants and herbs, such as cabbage, parsley, sage, &c. are titheable; and the same is a small tithe. But most commonly a sum of money is payable in lieu of tithe of gardens, either by custom, or by agreement. All fruits of trees are also titheable; and the tithe to be paid when they are gathered. If they are stolen, the parson, as well as the owner, must bear the loss. But if the owner suffers a stranger to take his fruit, the tithe shall be answered.

Adams v. Waller, Gwill. 1204. Hewitt v. Adams, 7 Bro. Parl. Ca. 64. Worrall v. Miller, Mich. 1801.

35. A claim was made in the year 1780, by the vicar of Kensington, to the tithe of hot-house plants. The Court of Exchequer was of opinion that they were titheable; on an appeal to the House of Lords, the case went off on another point. It has, however, been determined by the Court of Exchequer, in a subsequent case, that hot-house plants are not titheable.

Agistment tithe.

36. The profits arising from the agistment or pasturage of cattle are titheable of common right; because the grass eaten by such cattle is titheable, and must have paid tithe, if cut when full grown. It is predial, because it arises immediately from the land. And in a modern case it was held to be a small tithe.

Sear v. Trin. Coll. Gwill. 1445. 1 Wils. R. 170.

2 Inst. 651. Bunb. 446.

37. Agistment tithe is only payable for dry or barren cattle, that otherwise yield no profit to the parson; and not for cattle which are kept for the plough or pail, in the same parish; because the parson has tithe for them in another way.

38. Agistment tithe is not payable for horses kept for husbandry, saddle-horses, coach-horses, or other horses used merely for pleasure. But where coach-horses were used in carrying coals and manure into another parish, an agistment tithe was held to be payable for them.

Thorp v. Bendlowes, Gwill. 899.

Ayd v. Flower, Gwill. 613. contra Burn, Vol. III. 448.

39. Meadow grounds, which have paid tithe of hay are not afterwards liable to an agistment tithe.

Bunb. 3. Burn. Vol. III. 448.

40. Agistment tithe is payable by the occupier of the ground, not by the owner of the cattle; and as this tithe cannot be taken in kind, the person entitled to it can only receive what it is valued at, according to the price paid for the keeping of different beasts.

Crow v. Stodart, 3 Burn, 465. Gwill. 714.

41. An agistment tithe was held to be due for turnips sown after corn, and not severed, but eaten by unprofitable cattle; though it was urged to be an improvement of the land, and that the parson had the benefit of it in the next year.

42. Mixed tithes consist of the tenth of the young cattle bred in the parish; such as calves, lambs, pigs, &c.; and the time of payment of these is, when the animals are weaned, and able to live without the dam; unless the custom of the place be otherwise. Mixed tithes. 1 Crom. & Jer. 2 Yo. & Jerv. 575. Jacob, C.R. 560.

43. The wool of sheep and lambs is another mixed tithe; and is, *de jure*, due at the time it is clipped: but by prescription it may be set out altogether at another time. 3 Burn. 468.

44. Milk and cheese are titheable. But where tithe milk is paid in kind, no tithe cheese is due; and where tithe cheese is paid in kind, no tithe milk is due. Idem, 476.

45. By the stat. 2 & 3 Edw. 6. c. 13. it is enacted, that every person exercising merchandise, bargaining and selling, clothing, handicraft, or other art or faculty, who had, within forty years preceding, paid personal tithes, should pay for his personal tithes the tenth part of his clear gains; his charges and expenses, according to his estate, condition, or degree, to be therein abated, allowed, and deducted. Personal tithes.

46. It was formerly held that, in consequence of this statute, the fees of a lawyer, physician, attorney, and a man's salary, were titheable. But Doctor Burn observes, that personal tithes are now scarce any where paid, except for mills, and fish caught in the sea. Gwill. 430. Ecc. Law. Vol. III. 474. Vide 2 Bro. P. Ca. 446. 7 id. 3. 2 Price, 295. 3 Ves. & Bea. 71.

47. There are several things which are not titheable of common right, though in some places they are titheable by custom. Thus no tithes are payable for quarries of stone or slate; nor for mines of tin, lead, coal, lime, chalk, marl, or the like; for these are the substance of the earth, and not an annual produce; [but any of these may, it would seem, be titheable by custom, as lead in Derbyshire, and tin in Devonshire and Cornwall. So also tithes may be due by custom of white salt.] What things are not titheable. 2 Inst. 651. Toller on Tithes, 151. 1 Rol. Ab. 642. Dismes (S) 7, 8.

48. Houses are not titheable at common law, for the same reason. But by custom tithe is, in some towns, due for houses, in proportion to the rent reserved for them. And in the city of London tithes are payable for houses by act of parliament. Wats. c. 46. Bunb. 102. 106.

49. Forest lands are not titheable, provided they are in the hands of the king or his lessee. But if a forest is disafforested, and within any parish, the lands then become titheable. 3 Burn. 393.

50. By the statute 2 & 3 Edw. 6. c. 16. all barren heath and waste ground which is improved, and converted into arable or 2 Inst. 655.

meadow, shall not pay tithes for seven years after such improvement. (*a*)

Id. 651. 51. No tithe is due at common law for animals that are *feræ* Gwill. 427. 840. *naturæ*; such as deer, rabbits, &c. But, by the custom of many places, some animals of this kind are titheable.

To whom tithes are payable. 52. Before the council of Lateran, which was held in the year 1180, every person was at liberty to pay his tithes to whatever church or monastery he pleased; or he might pay them into the hands of the bishop, who distributed the revenues of his church among his diocesan clergy. But when dioceses were divided into parishes, the tithes of each parish were allotted to its own particular minister, first by common consent, or appointment of the lord of the manor, and afterwards by law.

Rectors or parsons. 1 Inst. 300. a. 1 Yo. 76. 125. 53. The tithes of each parish are therefore of common right due to the rector or parson thereof. And Lord Coke says, that *persona impersonata*, parson *imparsonee*, is the rector that is in possession of the church parochial, *jure ecclesiæ*.

Vicars. 1 Burn. Ecc. Law, 60. 54. When the practice of appropriating the advowsons of rectories or parsonages to monasteries was introduced, the monks usually deputed one of their body to perform divine service and other necessary duties in those parishes, of which the society were rectors; who were called vicars. But by several statutes it was ordered that such vicars should be secular priests, and sufficiently endowed, at the discretion of the ordinary. The endowments were usually of the small tithes, the greater tithes being still reserved to the monastery; from whence arose a new division of tithes into rectorial and vicarial.

Grene v. Austin, Gwill. 226. 55. The rector or parson is *primâ facie* entitled to all the tithes of the parish; therefore payment of tithes to the rector is a sufficient discharge against the vicar; because all tithes of common right belong to the rector, and the vicarage is derived out of the parsonage. So that no tithes belong *de jure* to the vicar, but only on an endowment, or by prescription, which ought to be shown on the part of the vicar; and the Court cannot intend it; for the vicarage is a diminution or impairing of the parsonage, of which the Court will not take notice, unless the parties shew it.

(*a*) Land which is of a good natural quality shall pay tithe immediately notwithstanding this statute, although the expense of bringing it into cultivation exceeds the return in the several first years. Warwick *v.* Collins, 5 M. and S. 166.—*Note to former edition.*

56. [The vicar's title depends wholly upon the endowment or upon prescription and usage.] Where the vicar produces an endowment, then the situation of the parties is reversed. The *primâ facie* title to the extent of that endowment is in favour of the vicar; and if the rector would claim any of the articles comprehended within the terms of it, the *onus probandi* is thrown upon him. In this case it is incumbent on the rector to give such clear and cogent evidence of an usage in the parish in his favour, with respect to the articles he would insist upon, as shall narrow the terms of the endowment, and induce a presumption that the parties interested in the tithes had come to a new agreement; that some different arrangement had been made with respect to the distribution of the tithes, between the date of the endowment, and the disabling statute of Queen Elizabeth.

Hiscocks v. Wilmot, 1 Gow. 197. Lady Dartmouth v. Roberts, 16 East. 334. Awdry v. Smallcombe Gwill. 1526. Masters v. Fletcher, 1 Younge, 48.

57. It has been determined that if a vicar hath for a long time used to take particular tithes or profits, he shall not lose them because the original endowment is produced, and they are not there. For every bishop having an indisputable right to augment vicarages, as there was occasion; and this whether such right was reserved in the endowment or not; the law will therefore presume that this addition was made by way of augmentation.

Bunb. 74.

58. The loss of the original endowment is supplied by prescription; that is, if the vicar hath enjoyed any particular tithe for a long time, the law will presume that he was legally endowed of it; for the same reason that it presumes some tithes might have been added by way of augmentation, which were not in the original endowment.

Idem. 4 Bli. N.S. 144. 4 Pri. 156. 190.

59. It sometimes happens that one person has a certain part of the tithes within the parish of another, which is called a portion of tithes; and the person entitled to it is called a portionist.(*b*) These portions are supposed to be prior to the council of Lateran, when it was lawful for every person to distribute his tithes, or any portion thereof, to whatever church he pleased. And a portion of tithes does not become extinct by vesting in the same

Portionists. 2 Rep. 44 b. 2 Inst. 641. 3 Bli. 224.

(*b*) [The title of a portioner must be either proved by shewing the grant under which he claims, or if it have been lost, by that species of evidence which would enable the Court to presume that such a grant once existed. Actual pernancy for a long period ought to appear. Woolley v. Platt, M'Clel. 473. Lewis v. Bridgman, 3 Sim. 316.]

Bp. of Carlisle v. Blain, 1 Y. & J. 123. ib. 135.

hands with the rectory. [And an incumbent of one parish is capable of holding tithes in another as a portionist.]

The King. 2 Rep. 44 a. 2 Inst. 647. Styles, 137. 1 Roll. Abr. 657.

60. In those places which are not within any parish, as in forests and the like, the king is entitled to the tithes, because he is not a mere layman, but *persona mixta*. This point was resolved in parliament, 5 Edw. 3. in a suit between the Crown and the Bishop of Carlisle, who claimed the tithes of the forest of Inglewood.

Lords of manors. 2 Rep. 45 a.

61. Lords of manors may be entitled to the tithes of the manor, by prescription. For in such case it will be supposed that the lord was seised of all the lands comprised within the manor, before the tenancies were derived thereout; and then, by composition or other lawful means, the lord acquired the tithes, paying a certain pension to the parson.

Lay impropriators.

62. When the monasteries were dissolved by King Henry VIII., the appropriation of the several benefices which belonged to them would by the rules of the common law have ceased; and they would have become disappropriated, had not a clause been inserted in all the statutes, by which the monasteries were given to the crown, to vest such appropriated benefices in the king, in as ample a manner as the monasteries had held them, at the time of their dissolution.

63. Almost all these appropriated benefices have been granted by the crown to lay persons, and are now held by their descendants, or by those who have purchased them from such grantees or their descendants. These are called lay impropriators.

3 Salk. 377.

64. The grants made by the crown of this kind of property are either of a rectory or parsonage, which comprises the parish church with all its rights, glebes, tithes and other profits whatsoever; or else of the tithes of a particular tract of land.

Wats. 509.

65. Where a portion of tithes was vested in the crown, and afterwards granted to a layman, he acquired the same right to it as the spiritual person in whom it was originally vested. Portions of tithes were also sometimes granted by religions corporations to laymen, to whom they now belong under that title.

Oxenden v. Skinner, infra. Woolley v. Platt, 1 M'Cl. 473.

1 Inst. 159 a.

66. By the statute 32 Hen. 8. c. 7. s. 7. it is enacted that all persons having any estate of inheritance, freehold, term, right, or interest, of, in, or to any parsonage, vicarage, portion, pension, tithes, oblations, or other ecclesiastical or spiritual profits, which

Crathorne v. Taylor, 2 Bro. Parl. Ca. 512.

were or should be made temporal, shall have the same remedies for recovery thereof, as for lands and tenements.

67. With respect to the estate which lay impropriators are capable of having in tithes, they may be tenants in fee simple, fee tail, for life, or years. Husbands may be tenants by the curtesy, and widows endowed of them. They are accounted assets for payment of debts, and have all other incidents belonging to temporal inheritances. An estate in tithes may be held in joint tenancy, coparcenary, or in common; and a partition of any of these may be obtained by a bill in Chancery.

What estate they may have. 1 Inst. 159 a.

68. On a bill for a partition of tithes and casual profits in the Isle of Wight, the defendant demurred, upon the ground that there were no casual profits, and that it might be divided upon a writ of partition.

Baxter v. Knollys, 1 Ves. 494.

Lord Hardwicke said,—"An ejectment will lie of tithes, of which the execution is a writ of possession; and the sheriff may do as much on partition as on a writ of possession on ejectment. This is not casual, whether tithes will rise or not. I do not doubt but this Court can divide them, as it may several things which cannot at law. Over-rule the demurrer, therefore."

69. Estates in tithes are alienable by lay impropriators, in the same manner as other real estates; and are comprehended within the statute of Uses, under the word *hereditaments*. But it should be observed, that no good title can be made to tithes by a lay impropriator, without showing the letters patent by which the tithes, or the rectory or parsonage to which they are annexed, were granted by the crown to some lay person; for this is the only mode of repelling any claim which may be made to those tithes by an ecclesiastical person claiming *jure ecclesiæ*. The letters patent should also be inspected, to see that no reversion remains in the crown.

70. With respect to exemptions from tithes, it should first be observed, that by the old law no layman was capable of having tithes, nor allowed to prescribe generally that his lands were exempt from the payment of tithes; for without special matter shown, it should not be intended that he had any lawful discharge: therefore, the mere non-payment of tithes, though for time immemorial, [did not previously to the recent act of 2 & 3 Will. 4. c. 100. (for shortening the time required in claims of *modus decimandi*, or exemption from or discharge of

Of exemptions from tithes. 2 Rep. 44 a.

3 Burn. Ecc. Law, 414.

tithes,)] amount to an exemption, and could not be pleaded against a spiritual person, without setting out and establishing the causes of such exemption, except in the case of portionists. Lands may, however, be exempted from the payment of tithes. 1. By real composition. 2. By a prescription *de modo decimandi.* 3. By a prescription *de non decimando.* 4. By act of parliament.

I. A real composition. 2 Inst. 490. Gwill. 801.

71. A real composition is where an agreement is made between the owner of lands and the parson or vicar, with the consent of the patron and ordinary, that his lands shall in future be freed from the payment of all tithes, in consideration of some land, or other real recompence, given to the parson or vicar, in lieu and satisfaction of such tithe. This kind of composition was formerly permitted, because it was supposed that the clergy would be no losers by it, as the consent of the ordinary, whose duty it was to take care of the church in general, and of the patron whose interest it was to protect that particular church, were both required to render the composition effectual.

13 Eliz. c. 10. s. 3.

72. No real composition for tithes can be good, unless it was made before the thirteenth of the reign of Queen Elizabeth; for by a statute made in that year, it is enacted that no parson or vicar shall make any conveyance of any lands, tithes, tenements, or other hereditaments, being parcel of the possession of their churches, to any persons, except leases for twenty-one years, or three lives. And though there have been several decrees made by courts of equity to confirm compositions, made with the consent of the parson, patron, and ordinary, subsequent to the stat. 13 Eliz., still they were not held to be binding on the succeeding incumbents, [previously to the above mentioned act of 2 & 3 Will. 4. c. 100.; but by the second section of that statute it is enacted that such compositions so confirmed, and which have not since been set aside, abandoned, or been departed from, shall be valid.]

Cholmley v. Att.-General, 7 Bro. Parl. Ca. 34. 2 Ed. 304. Mortimer v. Lloyd, 7 Bro. Parl. Ca. 44. 8 Ves. 537. 2 Swan. 311. Turn. 61.

73. It was formerly held that a composition real could not be established without shewing the deed by which it was created, or proving the actual existence of such deed. It was, however, laid down in a modern case, that although, in order to establish a real composition for tithes, it was not now considered as absolutely necessary to produce the deed, yet evidence must be given of such deed having existed. That where such evidence rests on reputation such reputation must be distinctly of payments

Hawes v. Swain, 2 Cox R. 179.

having been made under such a deed, and that those payments had their origin under an instrument made within time of memory; otherwise it will be evidence of a prescriptive payment. That although the Court had very properly relaxed in its practice, and did not now, as formerly, insist upon the production of the original instrument, yet they certainly expected that, in order to establish a real composition, the evidence should shew something that could distinguish it from a prescriptive payment.

74. In a subsequent case it was said, that where there has been a composition real, within time of memory, its commencement must be shewn, though it is not necessary to produce the deeds under which it took place. Presumptions are admitted in this, as in other cases; and the existence of such deeds may be inferred from other evidences. It is not necessary that the consent of all the parties should be by the same deed; this may frequently not happen. In the case of the King, who consents by letters patent it never can take place. But that a composition real could not be supported by evidence of immemorial payment.

Sawbridge *v.* Benton, Anstr. R. 372. See also Heathcote *v.* Mainwaring, 3 Bro. C. C. 217. and 2 Hen. Bl. 263. 4 Price, 143. 2 Bos. & Pul. 206. 3 Swan. 347.

75. A prescription *de modo decimandi*, usually called a *modus*, is where an immemorial custom has established a particular manner of tithing, different from the general way of taking tithes in kind; and the circumstances which are necessary to make a good and sufficient *modus* are laid down by Sir W. Blackstone and Doctor Burn.

II. Prescription *de modo decimandi*.

76. It is probable that every *modus* had its commencement by deed; because a composition for tithes can never become a *modus*, unless the patron and ordinary be parties thereto, or it be confirmed by them. But a *modus* may be prescribed for, without producing the deed by which it was created; for, wherever there has been a constant annual payment for time immemorial, it shall be intended that such payment had a proper commencement. And in the case of hemp, flax, and madder, it has been stated that a *modus* is established by act of parliament. (*a*)

Bacon *v.* Smith, 1 Sim. & Stu. 415. 12 East. 33. 2 Jac. & Wal. 464.

(*a*) [By the stat. 2 & 3 Will. 4. c. 100. it is enacted, that all prescriptions *de modo decimandi*, and to any exemption or discharge of tithes by composition, real or otherwise, shall in all claims for tithes in kind by the King or any other lay persons, (not being corporations sole) or by any body corporate of many, be valid, upon evidence shewing, in case of claim of a *modus decimandi*, the payment or render of such modus, and, in cases of claim to exemption or discharge, shewing the enjoyment of the

III. Or *de non decimando.*

1 Turn. 250.

77. A prescription *de non decimando* is a claim to be entirely discharged from tithes, and to pay no compensation for them. This may be a privilege annexed either to the person holding the lands; or to the lands themselves.

Cro. Eliz. 511. Hard. R. 315. Hertford *v.* Leech, W. Jones, 387.

78. The King being *persona mixta,* is not only capable of having tithes, but may also prescribe to be discharged from the payment of tithes; therefore, lands lying within a forest, and in the hands of the King, do not pay tithes, although they are within a parish. But this privilege only extends to the King's lessee, not to his feoffee.

79. Spiritual persons, or corporations, being capable of having tithes in pernancy, may prescribe to be discharged generally; so that no tithe shall be paid of their lands, nor any recompence for them. Besides, it is a maxim of law, that *ecclesia decimas non solvit ecclesiæ;* and a spiritual person may prescribe *de non decimando,* for himself, his farmers, and tenants, and also for his copyholders. For, by this means, it is to be presumed that the spiritual person has greater fines and rents.

4 Rep. 44 a.

Crouch *v.* Frier, Cro. Eliz. 784. Blanco *v.* Marston, Cro. Eliz. 479. 578.

80. The rector or parson of a parish is not liable to the payment of tithes to the vicar, nor the vicar to the rector; and a lay rector is also exempted from paying tithes to the vicar out of the glebe, as long as he holds it in his own hands; but upon the death of the spiritual or lay rector, or of the vicar, his executor is liable to the payment of tithes out of the growing crop.

81. A prescription *de non decimando* may also be annexed to

land without payment of tithes, money, or other matter in lieu thereof, for the full period of thirty years next before the time of such demand; unless in the case of claim of *modus decimandi,* actual payment or render, differing in amount or quality or quantity from the modus claimed, or, in case of claim to exemption, payment of tithes, or other matter in lieu thereof, shall be shewn to have taken place at some time prior to such thirty years, or it shall be proved that such modus claimed, or such enjoyment was had by agreement, by deed or writing; and if such proof in support of the claim shall be extended to sixty years before the demand, the claim shall be indefeasible; unless it can be proved that such modus was made and enjoyment had by consent, by deed, or agreement in writing. And with respect to claims for tithes in kind by any archbishop, bishop, dean, &c. or other corporation sole, spiritual or temporal, the period for limiting such claims is the whole time during which two persons in succession shall have held the office or the benefice, in respect of which such claims shall be made, and for not less than three years after the appointment of a successor; but if such period be less than sixty years, then for so many years as will make up sixty years. There are some exceptions to the operation of the act, ss. 3, 4. 6.]

See also stat. 3 & 4 Will. 4. c. 27. s. 29.

the land itself, though in the possession of lay persons: but this can only arise from the following circumstances.

Spiritual persons, or corporations, were always capable of having their lands totally discharged of tithes by various ways.— 1. By real composition. 2. By papal bulls of exemption. 3. By unity of possession; as when the rectory of a parish, and the lands in the same parish, both belonged to a religious house, those lands were discharged of tithes by this unity of possession. 4. By prescription; having never been liable to tithes, by being always in spiritual hands. 5. By virtue of their order; as the Knights Templars, Cistercians, and others; whose lands were privileged by the Pope with a discharge of tithes. 2 Comm. 32. Hob. 309.

82. These exemptions from tithes would have ceased upon the dissolution of the abbeys, and the lands become again subject to tithes, were it not enacted by the statute 31 Hen. 8. c. 13. s. 21., (*a*) that all persons who should come to the possession of the lands of any abbey then dissolved should hold them free and discharged of tithes, in as large and ample a manner as the abbeys formerly held them. And Sir W. Blackstone says, that from this original have sprung all the lands, which, being in lay hands, do at present claim to be tithe-free. For, if a man can shew his lands to have been such abbey lands, and also immemorially discharged from tithes, by any of the means before mentioned, this is now a good prescription *de non decimando*. But he must must shew both these requisites; for abbey lands, without a special ground of discharge, are not discharged of course; neither will any prescription *de non decimando* avail in total discharge of tithes, unless it relates to such abbey lands. 2 Comm. 32. Lamprey *v.* Rooke, Amb. R. 291. Markham *v.* Smith, 11 Pri. 126.

83. This privilege only extended to the lands of the religious houses, *quamdiu propriis manibus excoluntur;* not when in the occupation of their lessees or farmers. And it was formerly held that this exemption applied only to those persons who had an

(*a*) This statute applies only to the greater monasteries. It has been held that lands which were held discharged of tithes before time of memory, by one of the alien priories, and coming to the Crown on their suppression, were granted to one of the greater monasteries, in whose hands they remained till the dissolution, were no longer exempt. Penfred *v.* Groome, decree of the Exchequer, affirmed by the House of Lords. See 2 Jac. and Walk. 534., and Page *v.* Wilson, 513. In the latter case the lands had been granted to the monastery by the grantee of the Crown. In both cases the lands had not paid tithes since the dissolution.—*Note to former edition.*

estate in fee simple or fee tail in the land, not to tenants for life: but it has been resolved that a tenant for life, under a settlement, is entitled to the exemption.

[illegible]

84. A person was tenant for life, under a settlement, of lands which were formerly part of the possessions of the Cistercian order, and by that means exempt from tithes while in the manurance of the owner. It was contended that the tenant for life had not such a quantity of interest as would support that privilege: that to entitle the lands to that exemption, the person occupying them must be owner of the inheritance; he must have the same estate in him which the monastery had. In the case of Wilson v. Redman, the court held that tenant for life or years was not within the statute: but that tenant in tail, who had an estate of inheritance, was discharged *quandiu propriis manibus*, &c. Lord Ch. B. said, it was admitted that a tenant in tail was entitled to the exemption claimed: but it was argued that a tenant for life, under a settlement, was not. It was said that the tenant must hold the lands as the monastery held them, else the privilege could not attach. But it was impossible that the lands could now be holden precisely in the same manner as they were holden by the monastery. The monastery had them to them and their successors. Now a man had them to him and his heirs. But a fee simple may be divided into portions, into different estates for life, in tail, and remainder in fee. Where would be the difficulty to say, that the tenants of each portion should have the benefit as they succeed. The case of Wilson v. Redman had been cited: but from an extract from the answer in that case, with which he had been furnished, the parties there appeared to have had a fee simple; and therefore, that not being a case in which it was necessary to decide the point, it could not be considered of any authority. He could not see any reason why a tenant for life should be excluded from the benefit, any more than a tenant in tail; who, it was agreed, was exempt. There seemed to be no reason why all the component parts of the estate should not be exempt, as they severally came into possession. The Court decreed unanimously, that the tenant for life was exempt.

IV. Act of Parliament.

85. Lands may, and are now frequently exempted from the payment of all tithes, by acts of parliament. Thus, in many of the modern inclosure acts, the lands inclosed are for ever freed

and discharged from the payment of all tithes; and a portion of land is allotted to the spiritual or lay rector, or to the vicar, their successors and heirs, in lieu and satisfaction of them. In other acts of this kind a corn rent is substituted in the place of tithes. (*a*)

86. The doctrine that mere non-payment of tithes, though for time immemorial, does not amount to an exemption, was established in favour of the church. For in all other cases long acquiescence creates a title. Therefore when lay persons became capable of holding tithes, this principle ought not to have extended to them, because they are not within the reason of it. But still it has been held in several cases that a general prescription *de non decimando* can no more be set up against a lay rector or impropriator, than against a spiritual person.

Non-payment of tithes cannot be pleaded against a lay rector. 2 Rep. 44. b. Hob. 295.

87. Upon a bill for small tithes by a lay impropriator, it was proved by several witnesses that they never knew small tithes paid for. It was contended that in the case of a lay impropriator, the defendant might say, in bar of the demand of tithes, that no tithes had ever been paid or demanded for these lands. And although there was no express determination on the point; yet many of the judges were of that opinion. The court held the defence bad.

Bury Corporation v. Evans. Com. 364. Bunb. 284.

88. A bill was brought in the Exchequer by a lay impropriator, for tithes of hay and potatoes. The defence was that no tithes had ever been paid for the land, nor any *modus* or composition. It was said for the defendant, that the reason why a layman should not prescribe *in non decimando*, was founded on principles which did not hold since tithes were lay inheritances. That now, from length of time and possession, there was the same reason to presume a grant from the lay impropriator, in this case, as in cases of other inheritances. That this was not used as a prescription, but as an evidence of right, and to include a presumption of a grant. That before laymen were capable of tithes, an exemption was not sufficient to arise from non-payment of tithes only: but since it was quite otherwise; and possession in the hands of a layman was as good evidence of a right to tithes as of any other right.

Fanshaw v. More, Gwill. 780. 17 Geo. 2. 1 Eden. R. 276. S. C.

Lord Ch. B. Parker was of opinion that a layman could not

(*a*) *Vide* Stockwell v. Terry, 1 Ves. 117. Moncaster v. Watson, 3 Burr. 1375. Steele v. Mans, 5 Barn. and Ald. 22.—*Note to former edition.*

prescribe *in non decimando* against a lay impropriator, no more than against a spiritual one. It had been said that the statute of Hen. 8., which made tithes lay inheritances, had altered the case: but as a prescription from that time would not be good, consequently, that statute could not create a right by prescription. That this doctrine was not inconvenient; for grants of tithes might be preserved by enrolment; therefore were not likely to be lost, if due care was taken of them. That an act of parliament was attempted to remedy this by Sir George Heathcote, about fifteen years before, which miscarried. Baron Carter was of the same opinion: but Baron Reynolds doubted.

Baron Clarke said he knew no case which deserved more consideration; for though the authorities against such a prescription were very great, yet the reason of them grew weaker every day. Before the reformation all tithes were ecclesiastical; and a layman could have tithes by way of discharge only, by the grant of patron, parson, and ordinary. Since that, there were other ways, both of having tithes, and of being discharged from them. Since tithes had been in the hands of lay impropriators, many persons had purchased discharges for their particular lands; yet if such grants were lost by the common fate of things, those persons must lose the benefit of their purchases; and that must often happen, though they were enrolled, or any other way was taken to preserve them. Very few records of the church were extant; and it would be very hard that time, which strengthens all other rights, should weaken this. It seemed very extraordinary that a layman might prescribe, upon the presumption of a grant, for the portion of tithes in the soil of another, even against the rector of the parish, and yet could not prescribe for the tithes of his own land in the same way. If therefore he should concur in this opinion, it would be merely from the force of authority; for he thought that the reason of the thing was strong against it. He allowed that, in general, authorities ought to prevail in law; because great inconveniences and confusion would arise from overturning established rules of property. But in this particular case, the inconveniences and confusion of property would be much greater from pursuing those resolutions than from overturning them.

Infra, s. 92.

Nagle v. Edwards, 3 Anstr. 702.

89. The plaintiff sued in the Exchequer as lay impropriator of the parish of L. for tithes of hay and agistment. The defendant

insisted, that from tithes of hay never having been paid to the rector, within memory, a conveyance of them to the landholder should be presumed.

Lord Ch. B. Macdonald said, the plaintiff having made out to himself a clear title as rector, the defendant insisted on exemption from payment of hay and agistment tithe, on the ground of never having paid these tithes. From non-payment he wished the Court to presume a grant or conveyance of these tithes from the lay impropriator. It was clear that, against an ecclesiastical rector, this defence could never be set up in any shape. Whether a lay impropriator should have the same benefit was at first doubted: but that point seemed at rest. Three successive decisions upon it had fully established that there was no difference between a lay and an ecclesiastical rector.

90. In a subsequent case of this kind, the same judge said,— "It is now established by many cases, too firmly to be disputed, that mere non-payment is not, even among laymen, any answer to the demand of tithes. These determinations are perhaps to be lamented. I should have liked better to have found, in regard to tithes, the same principle of decision which regulates the title to every other lay fee. If non-payment for any length of time forms no presumption of a grant of the tithes; then the length of enjoyment, which in all other cases is the best possible title, serves only to weaken the claim of exemption from tithes, as the difficulty of tracing its origin is increased. In the present case it is hardly credible that the plaintiff's family have omitted for above two centuries to exert this right, from mere forbearance or negligence. Some other transaction probably took place between the parties, the memory of which is now lost. But the cases prevent us from deciding upon the ground of such a presumption."

Petre v. Blencoe, 3 Anstr. 945.

See ante, s. 82. note.

91. Lord Loughborough appears to have been inclined to differ from these cases, and to hold that non-payment alone might be set up as a defence to a claim of tithes by a lay impropriator: but Lord Eldon has decidedly upheld them. And it appears to be now settled, that a prescription *de non decimando* can no more be set up against a lay impropriator, than against a spiritual person; as such a prescription must have its origin at a time when the church was incapable of alienating its possessions. But the claim of a lay impropriator may be repelled by

Rose v. Calland, 5 Ves. 186.

Berney v. Harvey, 17 Ves. 119.

Vide Tit. 31. c. 2.

evidence of a grant of the tithes from some preceding lay impropriator.

But long possession of a portion of tithes creates a title.

92. It has been stated that portions of tithes were frequently severed from rectories before the council of Lateran; and therefore no claim can be made to them, but by persons deriving a title, either from the crown, or some ecclesiastical corporation, who had a power of alienation. It follows that there is a material difference between a prescription *de non decimando*, and a claim to a portion of tithes; for in the latter case, if the claim be supported by evidence of actual pernancy and enjoyment, for a long time, a court of equity will not interfere; but leave the parties to their legal remedy.

Fanshaw v. Rotherham, Gwill. 1177. 1 Eden, 276. Berney v. Harvey, 17 Ves. 127.

93. The plaintiff, as lay impropriator, brought his bill for an account of tithes; the defendant insisted, by his answer, that he and they whose estate he had in the lands, whereof the tithes were demanded, had a title to the tithes. It was in proof in the cause, that the defendant and those under whom he claimed had been in possession above one hundred years, and several conveyances intervening, without any claim from the plaintiff or his ancestors; it was insisted that there had been a severance of the tithes from the rectory; or that there had been some grant or deed, whereby the plaintiff's ancestors, or those who had the right to the rectory, had exempted the defendant's estate from the payment of tithes.

Lord Henley was of opinion that this by the grant became a lay fee; and the dispute, as between those entitled to the spiritual fee or rectory, must stand on the same foot, and be determined by the same law, as any other right or fee. In this case the plaintiff made no particular title at all; he would have the Court presume that his right descended to him, but did not shew any one family settlement, &c. for a great number of years, (above forty) where this was mentioned; and yet he prayed the Court to interpose against a possession which had been in the defendant and his ancestors above a century. It was urged that the law says, *caveat emptor:* but equity says, *teneat emptor*, if he is a fair purchaser. The defendant appeared to him as a fair purchaser, there having been several intermediate conveyances, and possession having gone along with them for above one hundred and thirty years; and therefore equity would not interpose to disturb him. If the plaintiff had any title at law,

he might pursue it. But equity would not interpose against a fair possessor, only because the plaintiff was afraid his title might fail at law. The bill was dismissed.

94. Doctor Scott, being rector of Simonburne in the county of Northumberland, filed his bill in the Court of Exchequer for the tithes of corn and grain of a farm called Eal's farm. The defendants, the Ayreys, were owners of part of the lands, and claimed the tithes of Eal's farm. The question was, whether the plaintiff was entitled to the tithes of corn and hay of the lands of which the Ayreys claimed the tithes. Scott *v.* Ayrey, Gwill. 1174.

The Lord Ch. B. said—This was not a demand of tithe of land, which had hitherto paid no tithe; and that the defence was not a prescription *de non decimando.* In all such cases the rule had been, that a person setting up an exemption from the payment of tithes must shew the particular ground of exemption. If that was not shewn, the defence amounted to no more than a mere non-payment of tithes, which, however long, was no defence: but in the present case the plaintiff claimed the tithe of land, of which tithe had been constantly taken; for although a part of the land had not actually paid tithe, it had been no otherwise exempt, than because the tenant of that part had been tenant of the tithe of all. The tithes having been actually paid, the next question was, how they had been paid;—they had been paid from particular lands in the nature of a portion of tithes. It appeared that in the year 1608 these tithes were in the possession of the family of Ridley; that they were sold in 1683 to one Whitfield; that in 1708 they were conveyed to Green in fee. They were afterwards mortgaged; and the devisee of the mortgagee purchased the equity of redemption, and devised to persons under whom the defendants claimed. For one hundred and seventy years they had been the subject of sales, mortgages, and devises, as other property; and had always been considered in the same light as the other real property of the persons, who from time to time had claimed them. They were capable of being enjoyed by the persons who had enjoyed them; and the question was, whether a court of equity ought to interfere to take the possession from persons who had been in possession for so many years, with knowledge of the rector. It did not appear how the Ridleys became entitled: but it appeared that, being in possession, they settled, mortgaged, and devised, these tithes as their

own absolute property. If, notwithstanding this long possession, the plaintiff was legally entitled, he was not without remedy: but it was too much in a case of this kind for a court of equity to interpose, and after so long a possession, to take the property from the possessors, and decree the rector to be entitled to it. The court had been pressed to direct an issue: but there seemed no reason to interfere thus far. Whether the Court directed an issue which adopted in some degree the plaintiff's demand, or left the plaintiff to pursue his legal remedy, he might make good his demand, if it was well founded. It was therefore not absolutely necessary for the court to interpose.

Mr. Baron Eyre said—The principal question in this case was, the defence set up by the Ayreys against the *primâ facie* title of the rector, founded on a title set forth in their answer, and the indisputable fact of actual possession, occupation, and pernancy of the tithes. The distinction between a prescription *in non decimando*, and a claim of a portion of tithes, was an essential distinction. A prescription *in non decimando* was simply unlawful; no such prescription could be maintained. If no tithes had been paid, a title founded upon mere non-payment was simply a prescription *in non decimando*. Evidence of length of possession the court could pay no regard to, for the possession must have been unlawful; and the court was therefore bound to decree in favour of the common right. No presumption could be admitted to support a mere simple prescription *in non decimando*. If the court departed from this rule, they overturned the whole law upon the subject. But there was a great difference between a claim founded upon a mere non-payment of tithes, and a claim supported by evidence of actual enjoyment and pernancy of the tithes. The title was not unlawful: there might have been a good title derived to the party in possession. The title therefore not being simply unlawful, long possession was evidence of the title. The case of Fanshaw *v.* Rotheram stated at the bar, and determined by Lord Northington, appeared to have been mistaken. The ground of that determination seemed to have been, that however doubtful the case stood as to title, there had been long possession. The claim was of a portion of tithes: the parties might have a good title; and it was not right for a court of equity to disturb the possession. The doctrine was good, applied to that or to this case. There was no difference between a lay

Ante, s. 93.

impropriator and a rector. The lay impropriator becomes, as it were, a spiritual person; he holds it in the same right. If it is not proper to disturb a possession in favour of a lay impropriator, it is not proper to disturb it in favour of a rector. He agreed with the Lord Ch. B. upon the ground of great length of possession, and the claim being of a portion of tithes, which might be lawful, that the bill ought to be dismissed. The other Barons concurred.

95. On a bill brought by a spiritual rector for tithes, the defendant set up a title to the tithes under family settlements and possession for one hundred and seventy-one years, as a lay fee. Barons Eyre, Hotham, and Perryn, thought the case of Scott *v.* Ayrey was determined on right grounds; that a court of equity ought not to assist against long possession; and that case having been acquiesced in, they thought they ought to dismiss the bill.

Edwards *v.* Lord Vernon, Gwill. 1177.

96. A bill was filed in the Court of Chancery by John Strutt, as patron in fee of a rectory, and as lessee for years of all the tithes under the rector, presented by him, against Baker, an occupier of lands in the manor of Graces, in that parish, and Sir B. Bridges, lord of the manor, and owner of the lands. The object of the bill was to establish the right of the rector to the tithes, and for an account. The answer of Baker stated, that by ancient and immemorial usage within the manor of Graces, or by other lawful ways and means, the lands in his occupation had been exempted from payment of tithes to the rector, in the proportion of two-thirds of all the tithes, and that the lord of the manor was entitled to those two thirds. The defendants then deduced their title from 37 Hen. 8. The rector had never received more than one third of the tithes; the lord of the manor received the other two thirds, and let some farms with the two thirds of the tithes; other leases were made expressly subject only to one third of the tithes to the rector.

Strutt *v.* Baker, 2 Ves. Jun. 622.

It was contended on the part of the plaintiffs, that the defence, though stated informally, was simply a prescription *de non decimando* in a *que estate*. There could not be such a prescription. If they claimed a portion of the tithes, that must be derived under a title from an ecclesiastical person; and they could not so claim, having made their defence upon the ground of a lay fee in the lord.

For the defendants it was said, that the defence was stated

inartificially: it was not meant to state an exemption from tithes, but an exemption from paying to the rector; because that portion belonged to the lord. It happened that the same family who had the tithes, had the manor: but it was not asserted that the lord took them in that character. It was so substantially stated, that the Court would leave the plaintiffs to law, according to the late uniform practice of that Court, and the Court of Exchequer. Where there had been an actual pernancy of the profits by lay hands under conveyances as lay property for a great while, the Court would not, by equitable aid, disturb such a possession, which might have a lawful commencement; and cited the cases of Fanshaw *v.* Rotherham, Scott *v.* Ayrey, and Edwards *v.* Lord Vernon.

Ante.

Lord Loughborough said—The defence was very fairly to be collected from the answer, which had set out all the facts that constituted the defence, and put the plaintiff into possession of all the case he was to meet. It stated different instruments, family conveyances, purchases, securities made, and recoveries; and wherever it was necessary to describe specifically the things which passed, as upon the recovery in the writ of entry, upon which the fine to the crown is taken, the two thirds of the tithes were particularly mentioned. He said he was glad to have been furnished with the authorities in which the Courts of Chancery and Exchequer had refused to aid, against a long possession, accompanied with family deeds and purchases, any inquiry into the right by which tithes were held. Courts of equity had no jurisdiction to affect purchasers. In the course of this long period during which no tithes had been paid to the rector, beyond a third part, there must have been many purchases; and Lord Northington laid particular stress upon that. Why was a court of equity to interfere to destroy a title, acquired under a purchase for a valuable consideration? In Scott *v.* Ayrey there was an actual occupation of the tithes. What was the evidence here? In some of the leases the lands were described expressly as subject to one third to the rector; in others, the farm was let, and the two thirds of the tithes were particularly specified as demised. On the other hand, when the lessee entered, he did not merely retain, he paid tithes; for he paid a thirtieth instead of a tenth, and that was clearly an ouster *quoad* the two thirds retained. It was full notice to all suc-

ceeding rectors, that it was not by fraud or subtraction; but an assertion of right, in opposition to that of the rector; and a clear adverse possession strongly manifested, by paying only one-thirtieth instead of one-tenth. Therefore the difference was only in words between this case and that of Scott *v.* Ayrey. The manner in which the owner had exercised his right was by demising the land, and the tithes of the land, to the same person, and receiving an accumulated sum, both for the tithe and the land. It was not necessary to enter into the discussion of the title; he could conceive a clear ground; the tradition of the parish shewed it. Was it necessary to put the subjects of this kingdom to account for their tithes antecedent to the reign of Hen. VIII.? If so, it was not for a court of equity to put them under that inquisition. Therefore he was perfectly warranted in following precedents so very respectable. The bill was dismissed with costs.

97. Where there has been an uninterrupted possession of a portion of tithes for two hundred and fifty years, which formerly belonged to an ecclesiastical corporation, a conveyance of them will be presumed.

98. An action was brought to recover a deposit made by the plaintiff upon his bidding for the manner of Elham, and lands at Elham, in Kent, of which five hundred and forty-nine acres were represented, by the particular of sale, to be tithe-free, or rather that the vendor was entitled to the tithes of those lands. An objection was made to the title of the vendor to the tithes; as to which the facts were these:—The priory of Rochester was entitled to a portion of the tithes of the lands sold. King Henry VIII. granted them to the dean and chapter of Rochester: but they never had possession of them; nor had any tithe been ever paid of the lands in question, except a modus of 20*s.* to the vicar. The title to the manor was derived from Sir Charles Herbert, to whom it had been granted in fee simple by King James I.

Oxenden *v.* Skinner, Trin. 1798, Gwill. 1513.

On the part of the plaintiff it was insisted, that here was no pretence of an exemption from payment of tithes. That the title to them was in the dean and chapter of Rochester; and that if a grant from them was to be presumed, the tithes were not conveyed by later deeds for want of express words, and therefore were in the Crown, or in the heirs of Sir Charles Her-

bert. On the part of the defendants, it was admitted that this was not an exemption. But it was said that from a possession of two hundred and fifty years, a conveyance from the dean and chapter of Rochester prior to 13 Eliz. would be presumed: and that the general words were sufficient to convey the tithes, as profits of the lands.

Lord Kenyon, before whom the abstract and all the opinions taken on both sides had been laid, said,—" All objections are admitted to be removed, except that which relates to the tithes. A court of equity, in these cases, has a discretion which I, sitting here, cannot exercise; as I am bound to tell the jury that the plaintiff cannot recover his deposit, if there be a good title to these tithes; and on all the circumstances, I think there is such good title. Here is possession of them for two hundred and fifty years. Who can disturb the title? The rector cannot. These tithes have been severed from the rectory ever since the Conquest. If these tithes had been part of the rectorial tithes, no time would have barred the rector. Where is there any other right? The dean and chapter of Rochester might before the 13 Eliz. have alienated them. I am very clear, that on a possession of two centuries and a half, I must tell the jury that they should presume any conveyance from the dean and chapter."

Humphreys *v.* Wagstaff, 1 Rus. & Myl. 529.

The plaintiff was nonsuited.

TITLE XXIII.

COMMON. (*a*)

SECT. 1. *Nature of.*
2. *Common of Pasture.*
3. *Appendant.*
10. *Appurtenant.*
15. *Because of Vicinage.*
19. *In Gross.*
21. *Stinted Commons.*
24. *Common of Estovers.*
31. *Common of Turbary.*
35. *Common of Piscary.*
36. *Common annexed to Copyholds.*
41. *A Right to Common cannot be Devested.*
SECT. 42. *Common may be Apportioned.*
47. *Rights of the Lord.*
54. *Rights of the Commoners.*
59. *Approvement of Common.*
78. *Inclosure of Commons.*
81. *Extinguishment of Common.*
82. I. *By Release.*
83. II. *By Unity of Possession.*
91. III. *By Severance.*
92. IV. *By Enfranchisement of Copyholds.*
95. *Common may be Revived.*

SECTION I.

COMMON is a right or privilege which one or more persons have, to take or use some part or portion of that which another person's lands, waters, woods, &c. produce. It commenced in some agreement between the lords of manors and their tenants, for valuable purposes; and being continued by usage, is good and valid at present, though there be no deed or instrument in writing to prove the original grant. Nature of.

2. The most general and valuable kind of common is that of pasture; which is a right of feeding one's beasts in another's land; for in those waste grounds which are called commons, the property of the soil is generally in the lord of the manor. This kind of common is either appendant, appurtenant, because of vicinage, or in gross. Common of pasture. 1 Inst. 122 a.

3. Common appendant is a right annexed to the possession of Appendant.

(*a*) [See the stat. 2 & 3 Will. 4. c. 71.]

land, by which the owner thereof is entitled to feed his beasts on the wastes of the manor. The origin of which is thus described by Lord Coke. "When a lord of a manor, wherein was great waste grounds, did enfeoff others of some parcels of arable land, the feoffees, *ad manutenendum servitium socæ*, should have common in the said wastes of the lord, for two causes; first, as incident to the feoffment; for the feoffee could not plough and manure his ground without beasts, and they could not be sustained without pasture; and by consequence the tenant should have common in the wastes of the lord for his beasts, which do plough and manure his tenancy, as appendant to his tenancy; and this was the beginning of common appendant. The second reason was for maintenance and advancement of agriculture and tillage, which was much favoured in law."

2 Inst. 85. 4 Rep. 37 a.

1 Roll. Ab. 396.

4. Common appendant must be time out of mind, and can only be claimed by prescription; so that it cannot be pleaded by way of custom. Thus where a person alleged a custom, that every inhabitant of a certain town had common of pasture in a particular place; it was resolved that such custom was against law, and therefore void.

Gateward's case, 6 Rep. 59.

4 Rep. 37 a.

5. Common appendant is regularly annexed to arable land only; yet it may be claimed as appendant to a manor, farm, or carve of land, though it contain pasture, meadow, and wood; for it will be presumed to have all been originally arable: but a prescription to have common appendant to a house, meadow, or pasture is void.

Emerton v. Selby, 2 Ld. Raym. 1015.

6. Common of pasture may be appendant to a cottage, for a cottage has at least a curtilage annexed to it; nor is it deemed in law to be a cottage, unless there are four acres of land belonging to it.

Hollinshead v. Walton, 7 East. 485.

7. It was resolved by the Court of King's Bench, in a modern case, that the owner of a tenement may have two distinct rights of common for his cattle, upon different wastes, in different manors, under several lords: though it might be otherwise if the different wastes had appeared to have been originally held under the same lord.

1 Inst. 122 a.

8. Common appendant can only be claimed for such cattle as are necessary to tillage; as horses and oxen to plough the land, and cows and sheep to manure it.

9. Common appendant may by usage be limited to any certain number of cattle: but where there is no such usage, it is restrained to cattle *levant* and *couchant* upon the land, to which the right of common is appendant; and the number of cattle which are allowed to be *levant* and *couchant* shall be ascertained by the number of cattle which can be maintained on the land during the winter. 1 Roll. Ab. 397-8. Bennet *v.* Reeve, 4 Vin. Ab. 583. Willes R. 227. Benson *v.* Chester, 8 Term R. 396. 1 Bar. & Ald. 709.

10. Common appurtenant does not arise from any connexion of tenure, but must be claimed by grant or prescription; and may be annexed to lands lying in different manors from those in which it is claimed. This species of common, though frequently confounded with common appendant, differs from it in many circumstances. It may be created by grant, whereas common appendant can only arise from prescription. It may be claimed as annexed to any kind of land, whereas common appendant can only be claimed on account of ancient arable land. It may be not only for beasts usually commonable, such as horses, oxen, and sheep: but likewise for goats, swine, &c. Appurtenant. 1 Roll. Ab. 399. 3 B. & Cr. 339. 6 East. 214.

11. Common appurtenant may be for cattle without number, or for a certain number only; and may be appurtenant to a manor by prescription, or by grant, made since time of memory; and that as well for a certain number of cattle, as without number: where it is without number, it is restrained to cattle *levant* and *couchant* on the land to which it is annexed. Therefore, if a person claims common by prescription on the land of another, for all manner of commonable cattle, as belonging to a tenement, this is a void prescription; because he does not say that it is for cattle *levant* and *couchant* on the land. Fitz. N. B. 180. n. 1 Roll. Ab. 398. Stevens *v.* Austin, 2 Mod. 185.

12. It has been determined in a modern case, that common for cattle *levant* and *couchant* cannot be claimed by prescription, as appurtenant to a house, without any curtilage or land. And Mr. Justice Buller said, the only question was, what was meant in former cases by the words *messuage* and *cottage*, annexed to which was the right of common claimed; for in all of them, the Court said, they would intend that land was included therein. And that it was necessary there should be some land annexed to the house was clear, from considering what was meant by *levancy* and *couchancy*: it meant the possession of such land as would keep the cattle claimed to be commoned, during the Scholes *v.* Hargreaves, 5 Term R. 46.

winter; and as many as the land would maintain during the winter, so many should be said to be *levant* and *couchant*.

1 Roll. Ab. 398. 13. Persons entitled to common appendant or appurtenant cannot in general use the common but with their own cattle. If, however, they take the cattle of a stranger, and keep them on their own land, being there *levant* and *couchant*, they may use the common with such cattle: for they have a special property in them.

Drury v. Kent, Cro. Jac. 15. W. Jones 375. 14. Common appendant or appurtenant for all beasts *levant* and *couchant* cannot be granted over; but common appurtenant for a limited number of beasts may be granted over: and it is said, that in a case of this kind, the commoner may grant over part of the right of common, and reserve the rest to himself.

Because of vicinage. 1 Inst. 122 a. 15. Common because of vicinage is where the inhabitants of two townships, which lie contiguous to each other, have usually intercommoned with one another; the beasts of the one straying mutually into the other's fields, without any molestation from either. This species of common is in fact only a permissive right, intended to excuse what in strictness is a trespass in both; and to prevent a multiplicity of suits. It can only exist between two townships or manors adjoining one another; not where there is intermediate land.

11 Mod. 72.

4 Rep. 38 a. 16. Common because of vicinage is not common appendant: but inasmuch as it ought to be by prescription, from time immemorial, as common appendant, it is in this respect similar to that species of common.

1 Inst. 122 a. 17. This right of common does not authorize an inhabitant of of one township or manor to put his cattle upon the wastes of the other township or manor: but he must put them upon the wastes of his own township or manor, from whence they may escape into the wastes of the other.

Corbet's case, 7 Rep. 5. 18. Common because of vicinage can only be used by cattle *levant* and *couchant* upon the lands to which such right of common is annexed: and if the commons of the towns of A. and B. are adjoining, and there are fifty acres of common in the town of A. and one hundred acres in the town of B., the inhabitants of the town of A. cannot put more cattle on their common than it will feed, without any respect to the extent of the common in the town of B., *nec è converso*.

19. Common in gross is a right which must be claimed by deed, or prescription, and has no relation to land, but is annexed to a man's person: this may be either for a certain or an indefinite number of cattle. And where a person has common of this kind, either for a certain or an indefinite number of cattle, he may put in the cattle of a stranger, and use the common with them. In gross. 1 Inst. 122 a. 1 Roll. Ab. 401, 2.

20. Neither common appendant, nor common appurtenant for cattle *levant* and *couchant*, can be turned into common in gross: but common appurtenant, for a limited number of cattle, may be granted over; and by such grant becomes common in gross. Idem.

21. In many cases the right to common of pasture is confined to a particular part of the year only; as from Michaelmas to Lady-day; in which case it is called a stinted common. So a person may have a right of common in a meadow, after the hay is carried, till Candlemas; or to common in a pasture, from the feast of St. Augustin till All Saints. Stinted commons. 1 Roll.Ab. 397.

22. In a case where a man prescribed to have common appendant, namely, if the land was sown by consent of the commoner, then he was to have no common till the corn was cut, and then to have common again till the land was sown by the like consent of the commoner; it was objected that this prescription was against common right, for it was to prevent a man from sowing his own land, without the leave of another. The whole Court held the prescription good; for the owner of the land could not plow and sow it, where another had the benefit of the common: but in this case both parties had a benefit, for each of them had a qualified interest in the land. Hawks *v.* Mollineux. 1 Leon. 73.

23. By the statute 13 Geo. 3. c. 81. ss. 16, 17, 18, it is enacted, that assessments may be made for the improvement of such commons; that the time of opening and shutting them may be varied by the major part, in number and value, of the owners and occupiers, with the consent of the lord or lady of the manor; and that commons which were formerly open during the whole year may be shut and unstocked for a time, reserving a portion for such of the commoners as may dissent.

24. Common of estovers is a right of taking necessary housebote, ploughbote, and hedgebote, in another person's woods or hedges, without waiting for any assignment thereof. Common of estovers.

25. We have seen that every tenant for life or years has a li- Tit. 3 & 8.

berty of this kind, of common right, in the lands which he holds for these estates, without any express provision of the parties; but this right may also be appendant or appurtenant to a messuage or dwelling-house, by prescription or grant, to be exercised in lands not occupied by the tenant of the house: as if a man grants estovers to another, for the repair of a certain house; they become appurtenant to that house; so that whoever afterwards acquires it, shall have such common of estovers.

Arundel *v.* Steere, Cro. Jac. 25.

26. A person prescribed to have estovers for repairing houses, or for building new houses on the land. It was alleged, that the custom was unreasonable, to take estovers for the building of new houses: but all the Court, except Williams, held it to be a good prescription; for one might grant such estovers at that day. Williams held the prescription bad, as it ought only to be for repair of ancient houses.

5 Rep. 25 a.

27. Where a person has common of estovers in a certain wood of another, by view and delivery of the owner's bailiff; if he takes estovers without such view and delivery, he is a trespasser, though he takes less than he was entitled to.

4 Rep. 87 a.

28. Where a person has common of estovers, either by grant or prescription, annexed to his house; though he should alter the rooms or chambers, or build new chimnies, or add to the house, the prescription will continue; but he cannot employ any of the estovers in the parts newly added.

Cro. Eliz. 820. Cro. Jac. 256.

29. If a person has common of estovers, and the owner of the soil cuts down part of the wood, the person entitled to estovers cannot take any part of the timber thus cut down, but must take his estovers out of the residue.

Plowd. 381.

30. Where a person has common of estovers appurtenant to a house, and he grants the estovers to another, reserving the house to himself; or grants the house to another, reserving the estovers to himself; in either of those cases, the estovers shall not be severed from the house, because they must be spent on the house.

Common of turbary.

31. Common of turbary is a right to dig turf upon another's land, or upon the lord's waste. This kind of common can only be appendant to a house, not to land; for the turfs are to be burned in the house; nor can it extend to a right to dig turf for sale.

32. In an action of trespass, *quare clausum fregit, et solum fodit*, the defendant justified that he and his ancestors, and all those whose estate he had in a certain cottage, had used to have common of turbary to dig and sell *ad libitum*, as belonging to the said cottage. Adjudged that this was a bad plea, such a right of common being repugnant in itself; for a common appertaining to a house ought to be spent in the house, and not sold abroad. Judgment accordingly. Valentine v. Penny, Noy 145.

33. In a modern case, a custom was pleaded in the manor of Hampstead for all the customary tenants, having gardens, to dig turf on the waste, for making grass-plots, at all times of the year, and as often, and in such quantity, as occasion required. The Court of King's Bench held that such a custom was bad in law, as being indefinite, uncertain, and destructive of the common. Wilson v. Willes, 7 East. 121.

34. Where common of turbary is appurtenant to a house, it will pass by a grant of such house with the appurtenances. Solme v. Bullock, 3 Lev. 165.

35. Common of piscary is a right to fish in the soil of another; or in a river running through another's land. And Lord Coke says, that this kind of right does not exclude the owner of the soil from fishing. Common of piscary. 1 Inst. 122 a. Vide Tit. 27.

36. Copyholders are not entitled by general custom to common, on the wastes of the manor of which their estates are held; but copyholders in fee or for life, may, by particular custom, have common on the demesnes of the manor. Common annexed to copyhold, 6 Rep. 60 b.

37. A copyholder of certain tenements, called Collins, in pleading alleged a custom, that all the tenants of the said tenements called Collins had used to have common in such a place, parcel of the said manor, and if the custom might be alleged within the manor, and applied to but one single copyhold, was demurred in law. Foiston's case, 4 Rep. 31 b. 6 Rep. 60 b.

Adjudged, that such custom, as well for the form as for the matter of it, was good. For, first, the copyholder, in his own name, could not prescribe, for the weakness of his estate; but if he could prescribe, he ought to do it in the name of the lord of the manor; to say, that the lord of the manor, and all his ancestors, and all those whose estate he had, had common in such a place, for him and his tenants at will; and that shall serve where the copyholder claimed common or other profits in the

White v. Sawyer, 6 Vin. Ab. 181.

soil of a stranger. But when the copyholder claimed common or other profit in the lord's soil, he could not prescribe in the name of the lord; for the lord could not prescribe to have common or other profit in his own soil: but then the copyholder must of necessity allege, that within the manor was such a custom, as in this case.

Swayne's case, 8 Rep. 63.

38. Where copyholders for life, according to the custom, have used to have common in the wastes of the lord of the manor, or estovers in his woods, or any other profit *apprendre* in any part of the manor; and afterwards the lord aliens the waste or woods to another in fee; if the lord grants copyholds for lives, the grantee will be entitled to common of pasture, or common of estovers, notwithstanding the severance: for the title of the copyholder is paramount to the severance, and the custom unites the common of estovers, which are but accessaries or incidents, as long as the lands, being the principal, are maintained by the custom; and these customary appurtenances are not derived from the estate of the lord, for he is the owner of the freehold and inheritance of the manor, but they are appertaining to the customary estate of the copyholder, after the grant made to him, which is preserved by the custom, and is paramount to the severance.

Worledge v. Kingwell, Cro. Eliz. 794.

39. If a copyhold, to which common belonged, escheats, and the lord regrants it with all common appendant, the grantee shall have common; for although the ancient common be extinct yet there was a new grant.

Badger v. Ford, 3 Barn. & Ald. 153.

40. In a modern case, where a copyhold tenement, to which a right of common was annexed, vested in the lord by forfeiture, who regranted it as a copyhold, with the appurtenances; it was held, that having always continued demisable, while in the hands of the lord, it was a customary tenement, and as such was still entitled to right of common.

A right to common cannot be devested. 5 Rep. 124 a. Tit. 36. c. 13.

41. A right to common being an incorporeal hereditament, and collateral to the land, cannot be devested. For though a person entitled to a right of common be not in the actual enjoyment of it; yet by *non user* only for a time, he does not cease to have a vested estate or interest therein.

Common may beapportioned. Tyrringham's case, 4 Rep. 36.

42. Common of pasture, where it is appendant, may be apportioned; because it is of common right. Therefore, if the commoner purchases part of the land in which he has a right of

common, the common shall be apportioned; as if the lord purchases a parcel of the tenancy, the rent shall be apportioned. So if A. has common appendant to twenty acres of land, and enfeoffs B. of part thereof, the common will be apportioned; and B. shall have common *pro rata*. For in such case no prejudice is done to the tenant of the land wherein the common is to be had; as he will not be charged with more, upon the whole, than he was before the severance. Tit. 28. c. 3.

43. In the case of common appurtenant, if the person entitled to it purchases part of the land, wherein the common is to be had, there shall be no apportionment; because common appurtenant is against common right. But this kind of common shall be apportioned by alienation of part of the land to which it is appurtenant. 1 Inst. 122 a. 4 Rep. 37 a.

44. One Wild being seised of a messuage and forty acres of land at Croydon, to which a right of common of pasture was appurtenant, on two hundred acres of land at Norwood, for all commonable cattle *levant* and *couchant* on the said messuage and forty acres of land; enfeoffed John Wood of five acres thereof. The question was, whether Wood was entitled to common appurtenant to his five acres. It was resolved that he was; and that the alienation of part of the land should not destroy the right of common, either of the alienor or alienee; but each should retain a right of common proportioned to his estate. Wild's case, 8 Rep. 78.

45. It was held in the same case, that if a person having a right of common appurtenant to his land, leases part of it, the lessee shall have common for beasts *levant* and *couchant* on the land.

46. Common of estovers or piscary cannot be apportioned; and Lord Coke says, if a person has housebote, haybote, &c. appendant to his freehold, they are so entire, that they shall not be divided. 1 Inst. 164 a.

47. With respect to the several rights of the lord or owner of the soil, and the commoners, it has been long settled that the lord of the manor, or other owner of the soil, in which there is a right of common, has the freehold and inheritance in him, and may exercise every act of ownership not destructive of the commoner's rights. Therefore, if a person claims by prescription any manner of common in another's land, and that the owner shall be excluded from having pasture, estovers, or the like Rights of the lord. 1 Inst. 122 a.

therein, this is a prescription against law, as contrary to the nature of common; it being implied in the first grant, that the owner of the soil should take his reasonable profit there. But a person may prescribe or allege a custom to have and enjoy *solam vesturam*, from such a day to such a day; whereby the owner of the soil shall be excluded from pasturing his cattle there at that time.

2 Roll. Ab. 267.

Hoskins v. Robins, 2 Saund. 324. Vide 1 Saund. 353. n. 2.

48. In a case which arose in 23 Cha. 2. it was resolved, that the copyholders of a manor may have the sole and several pasture, for the whole year, in the lord's soil; as belonging to their customary tenements; for this does not exclude the lord from all the profits of the land, as he is entitled to the mines, quarries, and trees.

Smith v. Feverell, 2 Mod. 6.

49. The lord by prescription may agist the cattle of a stranger on the common; but not otherwise. And in 27 Cha. 2. it appears to have been held, that a licence from the lord to a stranger, to put his cattle upon the common, was good; provided there was sufficient common left for the commoners.

——— v. Palmer, 5 Vin. Ab. 7.

50. On an application to the Court of Chancery, by the tenants of a manor, for an injunction against the lessee of a manor, to stay his digging of brick earth, and making bricks on the common; Lord King, assisted by Sir Joseph Jekyll, denied the motion; for that the lord was of common right entitled to the soil of the waste; and the tenants had only a right to take the herbage by the mouths of their cattle. That the lord had a right to open mines in the waste of a manor, and why not to dig brick earth; especially where the bricks were made for one of the tenants of the manor, and to be employed in building upon the manor.

51. A lord of a manor may dig clay-pits on the common, or empower others to do so, without leaving sufficient herbage for the commoners, if such a right has always been exercised by the lord.

Bateson v. Green, 5 Term R. 411. See also Place v. Jackson, 4 Dow. & Ry. 318.

52. A commoner brought an action against the lessees of a lord, for digging clay upon the common. It appeared that the herbage of the common was in many places destroyed by this practice: but it also appeared that clay had been dug by the lord on the common for seventy years preceding; and had been sold by him during that time.

The jury found a verdict for the plaintiff; but a new trial was

granted. Lord Kenyon said, the only question was, whether the evidence supported the verdict for the plaintiff; and he was clearly of opinion that it did not. It appeared that a few acres of the common had been rendered unproductive to the commoner: but the right of digging for clay in the common was incontestibly proved to have existed at all times in the lord; and no witness had stated in what respect this right had been more exercised latterly than formerly. That such a right, as the lord has here exercised, might exist in point of law could not be doubted: for if the lord had always dug on the common, and taken what clay he pleased, without interruption or complaint; and nothing appeared to shew that this right was limited to any particular extent; there was no pretence for subjecting him, or those who claimed under him, to such an action; though the commoners had been abridged of their enjoyment of some part of the common.

53. It is laid down by Mr. Justice Buller, in the above case, that where there are two distinct rights, claimed by different parties, which encroach on each other, in the enjoyment of them; the question is, which of the two rights is subservient to the other. It may be either the lord's right, which is subservient to the commoners'; or the commoners' which is subservient to the lord's. In general the lord's is the superior right, because the property of the soil is in him: but if the custom shew that it is subservient to the commoners, then he cannot use the common beyond that extent. 5 Term R. 416.

54. With respect to the rights of commoners, it is settled, that in the case of common of pasture they have nothing to do with the soil, but only a right to take the grass with the mouths of their cattle. It has, therefore, been held, that a commoner cannot make a trench or ditch on the common, to let off the water, unless he is authorized by a custom. Rights of the commoners. 1 Roll.Ab. 406.

55. Rabbits being considered as beasts of warren, a commoner cannot justify the killing or driving them away, because they are not vermin; and therefore the keeping of them by the owner of the soil is lawful. If the lord makes rabbit-burrows in the common, and stores them with rabbits, the commoners cannot justify killing them; for a commoner has nothing to do with the land, but to put in his cattle; and he may not meddle with any thing of the lord's there. Nor can a commoner fill up rabbit-burrows Bellew v. Langdon, Cro. Eliz. 876. Hadesden v. Gryssell, Cro. Jac. 195.

Cooper v. Marhall, 1 Burr. 259. 2 Leon. 201. 203. Yelv. 104.

made by the lord in the common: the commoner may, however, have an action on the case, if the lord leaves not sufficient common; and if the commoner's rights are injured by the making of rabbit-burrows, his remedy is by action.

Kirby v. Sadgrove, 1 Bos. and Pul. 13.

56. It has been held, in a modern case, that if the lord of the manor plants trees on his common, a commoner has no right to abate them.

1 Burr. 265.

57. It is said by Lord Mansfield, that the lord, by his grant of common, gives every thing incident to the enjoyment of it, as ingress, egress, &c.; and thereby authorizes the commoner to remove every obstruction to his cattle's grazing the grass which grows upon such a spot of ground; because every such obstruction is directly contrary to the terms of the grant. A hedge, a gate, or a wall, to keep the commoner's cattle out, is therefore inconsistent with a grant, which gives them a right to enter.

1 M'Cle. & Yo. 373.

58. In all instances of this kind, the commoner has a right to abate: and in a case where the lord brought an action of trespass, for pulling down hedges, the defendant pleaded that he had a right of common in the place where, &c., and that the hedges were made upon his common, so that he could not enjoy it as fully as before. The Court was of opinion that the defendant might abate the hedges; for thereby he did not meddle with the soil, but only pulled down the erection.

Mason v. Cæsar, 2 Mod. 66.

Approvement of common. 2 Inst. 85.

59. By the common law, the lord of a manor could not appropriate to himself, by inclosure or otherwise, any part of his wastes, in which his tenants enjoyed a right of common; because the common issued out of the whole and every part thereof. This inconvenience produced an article in the Statute of Merton, 20 Hen. 3. c. 4. by which it was enacted that when any of the tenants of a manor brought an assise of *novel disseisin* for their common of pasture, and it was therein recognised by the justices that they had as much pasture as sufficed to their tenements, together with free egress and regress from their tenements unto the pasture, they should be contented therewith; and they of whom it was complained should go quit of as much as they had made their profit of their lands, wastes, woods, and pastures. If they alleged that they had not sufficient pasture, or sufficient ingress and egress, according to their hold, the truth thereof was to be enquired into by the assise; if it was found as alleged, they

were to recover their seisin by view of the inquest, and the disseisors were to be amerced as in other cases.

60. This statute extended only to common appendant: but by the Statute of Westminster 2. c. 46. it was enacted that the Statute of Merton should bind neighbours, and such as claimed common of pasture, appurtenant to their tenements; but not such as claimed common by special grant or feoffment for a certain number, or otherwise. And Lord Coke observes that the word *vicinus* in this act is taken for a neighbour, though he dwell in another town, so as the towns and commons be adjoining to each other. And if the lord has common in the tenant's ground, the tenant may approve within this act, for there the lord is *vicinus*. 2 Inst. 473. Id. 474.

61. The statute of Westminster 2. also provides that, by occasion of windmills, sheepcotes, dairies, enlarging of a court, necessary curtilage, none shall be aggrieved by assise of *novel disseisin* for common of pasture. And Lord Coke says, there were five kinds of improvement expressed, that, both between lord and tenant, and neighbour and neighbour, may be done without leaving sufficient common to them that have it; any thing either herein or in the Statute of Merton to the contrary notwithstanding. And these five are put but for examples; for the lord may erect a house for the dwelling of a beast-keeper; and yet it is not within the letter of the law. 2 Inst. 476.

62. Lord Coke also observes on the words *necessary curtilage*, that they shall not be taken according to the quantity of freehold the lord has there, but according to his person, estate, or degree, and for his necessary dwelling and abode; for if he have no freehold in that town, but his house only, yet may he make a necessary enlargement of his curtilage. Idem.

63. In a subsequent case it was held that the lord cannot by the statute of Merton erect a house, unless it be for his own habitation or that of his shepherd; and he must allege that he built it for one of these purposes: otherwise he might build a great house to let to a nobleman, which might require a greater curtilage than the lord's or his herdsman's. Nevell *v.* Hamerton, Sid. 79.

64. The words of the statute of Merton are, *pastura et communia pasturæ;* so that it does not extend to common of turbary, estovers, piscary, or the like. And in a modern case it was held, that the lord of a manor has no right, under the statute of Mer- 2 Inst. 87. Grant *v.* Gunner, 1 Taunt. 435. Duberley *v.* Page, 2 Term R. 391.

ton, to inclose and approve the wastes of a manor, where the tenants have a right to dig gravel on the waste, or to take estovers there.

65. By the statute 3 & 4 Ed. 6. c. 3. the statutes of Merton and Westminster are confirmed; and it is further enacted that where judgment is given for the plaintiffs, in an assise, upon any branch of these statutes, the Court shall award treble damages.

Anon. 4. Leon. 41.

66. It was formerly doubted whether, in the case of a common appurtenant without number, the lord might approve for not being admeasurable, it was not approvable, because the common being without number, sufficiency could not be proved. Dyer and Manwood held, that although the common were without number, yet it might be reduced to a certainty, being by prescription: as the number of cattle which the best and most substantial tenant of the said tenement, at any time within the memory of man, had kept upon the waste; and then the lord might approve, leaving sufficient common according to such rate.

1 Inst. 122 a.

Smith *v.* How, 4 Rep. 38 b.

67. In the case of common because of vicinage, one may inclose against the other; and in 27 Eliz. it was resolved, where two lords of two several manors, had two wastes, adjoining parcels of their manors, without inclosure, but the bounds of each were well known, in which wastes the tenants of each manor had reciprocally common because of vicinage, that one might inclose against the other.

Fawcet *v.* Strickland, Com. Rep. 577. 6 Term R. 747. 1 Taun. 435.

68. It is laid down by Lord Chief Justice Willes, and the other Judges of the Court of Common Pleas, that although a lord of a manor cannot, by virtue of the statute of Merton, inclose and improve against common of turbary; yet that where there is common of pasture and common of turbary in the same waste, the common of turbary will not hinder the lord from inclosing against the common of pasture; for they are two distinct rights.

2 Term Rep. 391, 392 n.

69. Although the custom of a manor authorizes the commoners to inclose a part of the waste, under certain circumstances, yet this does not take away the lord's right of approving, under the statute of Merton; provided he leave sufficient common for the tenants.

70. In a modern case, the Court of King's Bench held that a custom authorizing the owners of ancient messuages within a manor, to have certain portions of the common called moss dales assigned to them in severalty, for digging turves, and after clearing them of turves, to approve them, and hold them in severalty, discharged from all right of common, was good in law. Clarkson *v.* Woodhouse, 5 Term R. 412. n.

71. In another modern case it was held by the same Court, that the lord may, with the consent of the homage, grant part of the soil of the common for building, if such a right has been immemorially exercised. Folkard *v.* Hemmett, 5 Term R. 417. n.

72. Where commoners have some other right on the common beside that of pasture, as of digging sand, &c. the lord may notwithstanding approve, if he leave sufficient common of pasture; and if such inclosure be no interruption to the enjoyment of the other kind of common. It was, however, laid down in a modern case, that there can be no approver in derogation of a right of common turbary. Shakespear *v.* Peppin, 6 Term R. 741. Grant *v.* Gunner, 1 Taunt. 435.

73. Although the statutes of Merton and Westminster speak of the lords of manors, as the only persons enabled to approve of commons, yet it has been held, in a modern case, that any person who is seised in fee of a waste within a manor, may approve, leaving a sufficiency of common: for otherwise not half the wastes in the kingdom could be approved; as many of the places that are called manors, would not be found such in point of law, if the matter were strictly examined. And Lord Kenyon observed, that though in the statutes of Merton and Westminster 2, only the lord is mentioned, yet in those days there was a paucity of expression in acts of parliament; for the lord of the manor is put as the owner of the soil, where they stand in the same predicament. And a contrary decision would be ruinous indeed, and extremely prejudicial to the public. Glover *v.* Lane, 3 Term. R. 445.

74. The Court of Chancery will assist and protect a lord of a manor in approving a common under the statute of Merton.

75. There having been an inclosure made out of a common, with young wood and timber growing thereon, and the plaintiff insisting that it was an approvement within the statutes of Merton and Westminster 2. the Court thought fit to continue an injunction which had been granted to him, and directed a trial Weeks *v.* Staker, 2 Vern. 301.

to be had next assizes, whether sufficient common was left for the tenants.

Arthington v. Fawkes, 2 Vern. 356. 1 Y. & Jer. 159.

76. The lord of a manor having inclosed part of a common and the tenants by force throwing open the inclosures, brought his bill to quiet him in possession; surmising he had only improved according to the statute of Merton, and had left a sufficiency of common; but that some of the defendants, although they pretended to have a right, were not entitled to inter-common upon the waste in question. Upon the hearing, two issues were directed to be tried at law:—1. As to some of the defendants, whether they had a right of common. 2. Whether there was sufficient common left, beyond what was inclosed. But the injunction was continued in the mean time, although it was a new inclosure, and made not above two years before the bill exhibited.

—— v. Palmer, 5 Vin. Ab. 7.

77. Upon a bill brought in Chancery by the tenants of a manor, against the lessee of the lord, to establish their right of common of pasture, and for an injunction against the defendant, for enclosing part of the common, Lord King, assisted by Sir Joseph Jekyll, denied the motion; for, by the statute of Merton the lord might inclose part of the waste, leaving sufficient common. That at common law, in an action brought against the lord, the tenant must allege in the declaration, that there is not sufficient common left, or he cannot maintain the action: and if that should be the case, the tenants might have their remedy at common law; and it was too soon for an injunction before answer.

Inclosure of Commons.

78. The approvement of commons having been found to be extremely beneficial to the public, by increasing tillage and agriculture; it was enacted by the statute 29 Geo. 2. c. 36. s. 1. that it should be lawful for his Majesty, his heirs and successors, and all other owners of wastes, woods, and pastures, wherein any persons or bodies politic have right of common of pasture, by and with the assent of the major part in number and value of the owners and occupiers of the tenements to which such right of pasture doth belong; and to and for the major part in number and value of the owners and occupiers of such tenements, by and with the assent of the owner or owners of the said wastes, woods, and pastures; and to or for any other person or persons, or bodies politic, by and with the assent and grant of the owner or owners

of such wastes, woods, and pastures, and the major part in number and value of the owners and occupiers of such tenements, to inclose, for the growth and preservation of timber and underwood, any part of such wastes, woods, and pastures.

79. By the statute 31 Geo. 2. c. 41. it is provided, that if any recompence be agreed to be given for such inclosure, it shall be made to the persons interested in the right of common, in proportion to their respective rights, and not to the overseers of the poor, as was directed by the second section of the preceding act. And the powers given to owners by that act may be exercised by tenants for life, or years, during their respective interests; with a proviso, that nothing done by them shall have effect after the determination of their estates.

80. Commons have frequently, in modern times, been entirely inclosed, and allotted to the persons having rights of common, in proportion to the number of cattle they were entitled to put on the common. But this is usually effected by means of a private act of parliament; of which an account will be given in a subsequent Title. And by the stat. 13 Geo. 3. c. 81. s. 15. lords of manors, with the consent of three-fourths of the persons having right of common, are enabled to lease for four years any part of the said commons, not exceeding a twelfth part thereof; and to apply the rent in draining, fencing, or otherwise improving the residue of the said wastes. Tit. 33.

81. A right to common may be extinguished, 1. By a release of it to the owner of the land. 2. By unity of possession of the land. 3. By severance of the right of common. And, 4. by enfranchisement of a copyhold to which a right of common is annexed. Extinguishment of common.

82. Every right of common may be extinguished by a release of it to the owner of the soil wherein such right is exercisable. And as a right to common is entire throughout the whole of the land subject to it, if the commoner releases any part of the land from his right of common, it will operate as an extinguishment of the right in every other part. I. By release. Rotheram *v.* Green, Cro. Eliz. 593. 5 Vin. Ab. 17.

83. Common appendant and appurtenant become extinguished by unity of possession of the land, to which the right of common was annexed, with the land in which the common was; for where a person has as high and perdurable estate in the land as in the common, there the common becomes extinct. II. By unity of possession. 4 Rep. 38 a. 1 Taunt. 205. Co. Lit. 313 b.

Bradshaw v. Eyr, Cro. Eliz. 570.

84. In trespass for breaking his close in Abney, the defendant pleaded, that long before, &c., one Bradshaw was seised of the place where, &c. in fee; that one Fuljamb was seised in fee of a house and twenty acres of land in Abney aforesaid; that the said Fuljamb, and all those whose estates, &c. had common in the same place where, &c. and the said Fuljamb enfeoffed of the said tenement the said Bradshaw; that afterwards the said Bradshaw let unto the defendant the said house and twenty acres of land, with all commons, profits, and commodities thereto appertaining, or used with the said messuage; and thereby justified putting in his cattle to use the common, &c. Upon demurrer, it was held clearly that this common was extinguished by the unity of possession, and could not be revived again. Gawdy, Just. said it was the same of common appendant.

Nelson's case, 3 Leon. 128.

85. Where the abbot of D. was seised of a common out of the abbey of S., as appurtenant to certain lands of the abbey of D.; afterwards both these abbeys were dissolved, and the possessions of both were given to the King, to hold in as ample a manner as the abbots held them. Afterwards, the King granted the lands of one abbey to A., and those of the other abbey to B. It was determined that the words "in as ample a manner, &c." were to be construed according to law, and no further: and that the unity of possession of the King had extinguished the common.

86. To constitute such an unity of possession as will extinguish a right of common, the person must have an estate in the lands to which the common is annexed, and in those where the right of common exists, equal in duration, and all other circumstances of right.

The King v. Hermitage, Carth. 239.

87. A right of common was appendant to certain tenements, which were parcel of the abbey of Sarum, in a common that was parcel of the Duchy of Cornwall. Upon the dissolution of the abbey of Sarum, these tenements became vested in King Henry VIII. in fee, in whom the Duchy of Cornwall was then vested, for want of a Duke of Cornwall. Resolved, by Lord Holt and the rest of the Judges, that this was not such an unity of possession as would destroy the right of common, because King Henry VIII. had not as perdurable an estate in the one as in the other; for in the Duchy of Cornwall the King had only a fee determinable on the birth of a Duke of Cornwall, which was a base fee;

but in the tenements in question he had a pure fee simple, indeterminable, *jure coronæ.*

88. A parson had common appendant to his parsonage, in the lands of an abbey; afterwards the abbot had the parsonage appropriated to him and his successors. It was held by Wyndham and Meade *contra* Dyer, that the abbot had not as perdurable an estate in the one as in the other; for the parsonage might be disappropriated, and then the parson would have the common again. Anon. Godb. 4.

89. Where the lord approves a part of the waste, and afterwards one of the commoners purchases the part so approved, this will not extinguish his right of common; because, by the approvement, the land was utterly discharged of common. Dyer 339. pl. 45.

90. It has been stated, that where a person having common appurtenant, purchases part of the lands, wherein the common is to be had; the whole right of common shall be extinct. It has also been held, that where a person having common appurtenant, takes a lease of part of the land, in which he has such right of common, all his common shall be suspended during the continuance of the lease; because it was the folly of the commoner to intermeddle with the land, over which he had a right of common. Ante, s. 44. 8 Rep. 79 a.

91. Common appendant or appurtenant for cattle *levant* and *couchant* may also be extinguished by severance. As where a person having common of this kind annexed to a messuage or tenement, conveys away the messuage or tenement, excepting the common, this will create an extinguishment of the common. III. By severance. 1 Roll. Ab. 401. 4 Vin. Ab. 594. O. pl. 1.

92. Where a right of common is annexed to a copyhold estate, and the lord grants the land to the copyholder and his heirs, *cum pertinentiis*, the common is extinguished; because it was annexed to the customary estate, which being destroyed, the right of common is gone. And the words *cum pertinentiis* cannot have the effect of continuing it; because the right of common was not appurtenant to the freehold estate granted by the lord. IV. By enfranchisement of copyholds. Tit. 10. c. 6. Marsham *v.* Hunter, Cro. Jac. 253. Gilb. Ten. 224.

93. This doctrine does not appear to be allowed in equity; for where the lord of a manor enfranchised a copyhold, with all common thereto belonging or appertaining, afterwards bought in all the copyholds, and then disputed the right of common with the copyholder he had enfranchised, and recovered against Styant *v.* Staker, 2 Vern. 250.

him, the Court decreed that he should hold and enjoy the same right of common which belonged to the copyhold.

6 Mod. 20.

94. It is said by Lord Holt, that if a copyholder of one manor has common in the wastes of another manor, an enfranchisement of the copyhold does not extinguish the common; for it is a derivative right which the copyholder has. So, if it be taken as appendant to land, enfranchisement will not extinguish it.

Common may be revived.

95. A right of common, which has been extinguished by unity of possession, may be revived by a new grant.

Ante. s. 84.

96. Thus, in the case of Bradshaw *v.* Eyr, the Court held that the words of the lease, "all commons, profits, &c. occupied or used with the said messuage, &c." operated as a grant of a new right of common. For although it was not common in the purchaser's hands, yet it was *quasi* common, used therewith; and though not the same common as was used before, yet it was the like common.

Sandys *v.* Oliff, Moo. 467. Grymes *v.* Peacock, Bulst. 17. Clements *v.* Lambert, 1 Taunt. 205.

97. Where common appurtenant to a messuage was extinguished by unity of possession in the lord's hands, it was held, that a grant by the lord of the messuage, with all common appurtenant, did not pass the common extinct. But that a grant of all commons usually occupied with the said messuage would have passed such common as the first was.

Sawyer's case, W. Jones 285.

98. Where a person had common in gross, derived from the abbot of W., which was destroyed by unity of possession in the crown, with the lands in which the common was; and the crown granted the lands to which the common belonged, with the words, *Tot, tanta, talia, libertates, privilegia, et franchis, &c. quæ, &c. aliquis, &c.* Resolved, that being common in gross, it was not revived; for in that case every person who had any part of those lands should have as great common as the abbot had; and so the common would be infinitely surcharged. But if such common had been appendant or appurtenant, it would have been revived; for no person would have common for more cattle than were proportionable to his land.

Worledge *v.* Kingwell, Ante, s. 39.

TITLE XXIV.

WAYS.

SECT. 1. *Nature of.*
4. *How claimed.*
14. *How to be Used.*
21. *Cannot be Devested.*
SECT. 22. *Who are bound to repair.*
23. *How Extinguished.*
25. *How Revived.*

SECTION I.

A RIGHT of way is the privilege which an individual, or a particular description of persons, such as the inhabitants of the village of A., or the owners or occupiers of the farm of B., may have, of going over another person's grounds. It is an incorporeal hereditament of a real nature; entirely different from the king's highway, which leads from town to town; and also from the common ways, which lead from a village into the fields. Nature of.

2. There are three kinds of ways, First, a footway, which is called *iter, quod est, jus eundi vel ambulandi hominis.* The second is a footway and horseway, which is called *actus ab agendo.* This is vulgarly called a pack and primeway, because it is both a footway, and a pack or driftway also. The third is *via* or *aditus,* which contains the other two, and also a cartway; for this is *jus eundi, vehendi, et vehiculum et jumentum ducendi.* This is twofold; namely, *regia via,* the king's highway for all men; and *communis strata,* belonging to a city or town, or between neighbours. 1 Inst. 56 a.

3. Notwithstanding these distinctions, it seems that any of the ways here described which is common to all the king's subjects, whether it lead directly to a market town, or only from town to town, may properly be called a highway; and that any such cartway may also be called the king's highway. But a way to a parish church, or to the common fields of a town, or to a village, which terminates there, may be called a private way; because it does not belong to all the king's subjects, but only to 1 Vent. 189. 1 Term R. 570.

the inhabitants of a particular parish, village, or house. And Lord Hale says, that whether it be a highway or not, depends much upon reputation.

How claimed. Tit. 31. c. 1. 9 Barn. & Cres. 933.

4. A right of way over another person's ground may be claimed in three ways. 1. By prescription and immemorial usage:(a) as, where the inhabitants of a certain vill have, time out of mind, traversed a particular close or field, to get to their parish church.

Palm. Rep. 387.

So a person may prescribe for a way from his house, through a certain close, to the church; though he himself has lands next adjoining to his house, through which of necessity he must first pass. For the general prescription shall be applied only to the lands of others.

Jenk. Cent. 3 Ca. 94.

5. It was held in 18 Edw. 4. that a person may have a right of way to go through a church-yard. And it was said in that case, that the church-yard of the Charter House was a common way for the inhabitants of London to St. John's.

6 Mod. R. 3.

6. A person cannot claim a way over another's ground, from one part thereof to another; but he may claim a way over another's ground, from one part of his own ground to another.

7 Barn. & Cress. 257.

7. 2. By grant; as where the owner of a piece of land grants to another the liberty of passing over his lands in a particular direction; the grantee thereby acquires a right of way over those lands.

Senhouse v. Christian, 1 Term R. 560.

8. It has been determined in a modern case, that where a person granted to another "a free and convenient way, as well a horseway, as a footway, as also for carts, waggons, wains, and other carriages whatsoever, in, through, over and along a certain slip of land, &c., to carry stone, timber, coal, or other things whatsoever," the grantee had a right to lay a framed waggon way along the slip of land, for the purpose of carrying coals; it being the most convenient way for transporting them: but that the grantee was not justified in making transverse roads across the slip of land.

(a) [By stat. 2 & 3 Will. 4. c. 71. s. 2. It is enacted, that rights of way and other easements after uninterrupted enjoyment for twenty years, shall not be defeated by shewing only that such right was first enjoyed at any time previous to such period of twenty years; but nevertheless, such claim may be defeated in any other way by which the same was at the time of the passing of the act liable to be defeated: and that where such enjoyment shall have been for forty years, the right thereto shall be indefeasible, unless it shall appear that the same was enjoyed by consent or agreement, expressed by deed or writing.]

9. It was held in another modern case, that an uninterrupted enjoyment of a right of way for twenty years, and no evidence that it had been used by leave or favour, or under a mistake, was sufficient to leave to a jury to presume a grant. Campbell *v.* Wilson, 3 East. R. 294. Livett *v.* Wilson, 3 Bing. 115.

10. 3. A person may claim a right of way over another's land from necessity. As if A. grants a piece of land to B., which is surrounded by land belonging to A.; a right of way over A.'s land passes of necessity to B., for otherwise he could not derive any benefit from his acquisition. And the feoffor shall assign the way where he can best spare it. It is the same though the close aliened be not totally inclosed by the land of the grantor, but partly by the land of a stranger; for the grantee cannot go over the stranger's land. 2 Roll. Ab. 60. 3 Taunt. 24. 5 ib. 311.

11. In trespass upon demurrer the case was, a person sold lands; afterwards the vendee by reason thereof claimed a way over the plaintiff's lands, there being no other convenient way adjoining; and whether this was a lawful claim was the question. It was resolved, without argument, that the way remained; and that he might well justify the using thereof, because it was a thing of necessity; for otherwise he could not have any profit of his land. Clark *v.* Cogge, Cro. Jac. 170.

12. It was held in the same case, that if a man hath four closes lying together, and sells three of them, reserving the middle close, and has no way thereto but through one of those which he sold, although he did not reserve any right of way, yet he shall have it, as reserved to him by law. Vide 1 Saund. Rep. 323. n. 6.

13. In a modern case, it was determined by the Court of King's Bench, that where a person conveys land, merely as a trustee, to another, to which there is no access but over the trustee's land, a right of way passes of necessity, as incident to the grant. And Lord Kenyon observed, it was impossible to distinguish this from the general case, where a man grants a close surrounded by his own land, in which case the grantee has a way to it, of necessity, over the land of the grantor; merely on the ground that the plaintiff conveyed to the defendant in the character of a trustee; for it could not be intended that he meant to make a void grant. There being no other way to the defendant's close, but over the land of one of the persons who granted to him, he was entitled to such a way of necessity, upon the authority of Howton *v.* Frearson, 8 Term R. 50. Reignolds *v.* Edwards, Willes R. 282.

all the cases, and the principle that every deed must be taken most strongly against the grantor.

How to be used.

14. A right of way can only be used according to the grant, or the occasion from which it arises; and must not exceed it. Therefore, if a person has a right of way over another's close to a particular place, he cannot justify going beyond that place.

Howell v. King, 1 Mod. 190.

15. In trespass for driving cattle over the plaintiff's ground, the case was,—A. had a way over B.'s ground to Blackacre, and drove his beasts over B.'s ground to Blackacre, then to another place beyond Blackacre. Upon demurrer, the question was, whether this was lawful or not. It was urged, that when the defendant's beasts were at Blackacre, he might drive them whither he would. On the other side, it was said, that by this means the defendant might purchase one-hundred or one-thousand acres adjoining to Blackacre, to which he prescribed to have a way, and by that means the plaintiff would lose the benefit of his land: that a prescription presupposed a grant, and ought to be continued according to the intent of its original creation; to which the Court agreed; and judgment was given for the plaintiff.

Lawton v. Ward, 1 Ld. Raym. 75.

16. The same point appears to have been determined in a subsequent case, in which Powell, Justice, observed, that the difference was, where the person having a right of way to a particular place, goes farther, to a mill, or a bridge, there it may be good: but when he goes to his own close, it is not good. The editor of the fourth edition of Lord Raymond's Reports, in a note upon this passage, expresses a doubt, whether this distinction be well founded; and says, "The true point to be considered upon such a case should seem to be, *quo animo* the party went to the close; whether really and *bonâ fide* to do business there, or merely in his way to some distant place."

17. Where a person has a right of way over another's land, and the road is impassable, he may go over any other part of the land.

Henn's case, W. Jones, 296.

18. In an action of trespass for destroying his close, the defendant pleaded, that time out of mind there was a common footpath through the close, &c. The plaintiff replied, that the defendant went in other places, out of the way. The defendant rejoined, that the footpath was *adeo luteosa et funderosa*, by de-

fault of the plaintiff, who ought to amend it: that he could not pass along; therefore he went as near the path as he could in good and passable way: this was resolved to be a good plea and justification.

19. It has however been resolved, in a modern case, that where a person has a right to a precise specific way over another's ground, which he is bound to repair, he cannot deviate from it, even though it should be overflowed by a river.

20. In trespass for breaking and entering a close, the defendant pleaded a right of way, by prescription, through a lane of the plaintiff's; that the tenants of the *locus in quo* were bound to repair; that the lane was overflowed with water, and that he necessarily went over the *locus in quo*. The plaintiff having traversed the prescription to repair, and the right of way, the jury found for the plaintiff, as to the first plea, respecting the repairs, and for the defendant, as to the second plea, respecting the right of way. Taylor v. Whitehead, Doug. 745.

The question on the validity of the last plea having been argued, Lord Mansfield said,—"The question is upon the grant of this way. Now it is not laid to be a grant of a way generally over the land, but of a precise specific way. The grantor says, you may go in this particular line: but I do not give you a right to go either on the right or left. I entirely agree with my brother Walker, that, by common law, he who has the use of a thing ought to repair it. The grantor *may* bind himself, but here he has not done it. He has not undertaken to provide against the overflowing of the river; and, for ought that appears, *that* may have happened by the neglect of the defendants. Highways are governed by a different principle; they are for the public service; and if the usual tract is impassable, it is for the general good that people should be entitled to pass in another line." 2 Show. R. 28.

Mr. Justice Buller observed, that if this had been a way of necessity, the question would have required consideration: but it was not so pleaded. It did not appear that the defendant had no other road. Vide 1 Saund. R. 322. n. 3.

21. A right of way being an incorporeal hereditament, similar in many respects to a right of common, cannot be devested. Cannot be devested. Touch. 23.

22. It seems that by the common law, where a person granted a right of way over his land to another, the grantee was bound Who are bound to repair.

Rider v. Smith, 3 Term R. 766.

to repair it. But the grantor of a private way may be bound to repair it, either by prescription, or by an express stipulation.

How extinguished. Heigate v. Williams, Noy Rep. 119. Sharp v. Piggott, 3 Bulst. 340. 5 Taunt. 311.

23. Where a person has a right of way over another's close, and he purchases the close, his right of way is extinguished by the unity of seisin and possession if it be only an easement: but if it is of necessity, it is not extinguished by unity of possession.

Jordan v. Atwood, 1 Roll. Ab. 936.

24. Thus, if a vill has a right of way to a church, and one of the vill purchases the land over which the way is; yet this unity of possession shall not extinguish the way, because it is a thing of necessity.

How revived.

25. It is said that where a right of way has been extinguished by unity of possession, it may be revived by severance.

Jenk. Cent. 1. Ca. 37.

26. Thus where upon a descent to two daughters, land over which there had been a right of way was allotted to one of them, and the land to which the right of way belonged was allotted to the other; it was held that this allotment, without specialty to have the way anciently used, was sufficient to revive it.

pl. 15.

27. There is a case similar to this in Brook's Ab., title *Extinguishment*, where it is doubted whether the partition did not create a new right of way. But this doctrine of revival does not seem to have been admitted in the following case.

Whalley v. Tompson, 1 Bos. & Pul. 371.

28. Thomas Adderley being seised at the same time of two closes, over one of which a right of way had been immemorially used to the other, devised the close to which the right of way had been annexed with its appurtenances to A. B., and devised the other close to another person. A. B. claimed the right of way. The Court held, that from the moment when the possession of the two closes was united in one person, all subordinate rights and easements were extinguished. The only point therefore that could possibly be made in the case was, that the ancient right, which existed while the possession was distinct, was merely suspended, and might revive again. It was admitted that the word appurtenances would carry an easement, or legal right: but its operation must be confined to an old existing right. And if the right of way had passed in this instance, it must have passed as a new easement: but the right of way being extinct, the word appurtenances had nothing to operate upon.

29. It is said that though a right of way be extinguished, yet if it is used for thirty years after, this is sufficient to afford a presumption of a new grant or licence from the owner of the land. Keymer *v.* Summers, Bull. N. P. 74.

30 [The words "with all ways, &c., thereto belonging or in anywise appertaining" in a conveyance, will not pass a way not strictly appurtenant, unless the parties appear to have intended to use those words in a sense larger than their ordinary legal sense.] Barlow *v.* Rhodes, 1 Cro. & Mee. 439. See 2 B. & C. 96. Bulst. 17.

TITLE XXV.

OFFICES.

SECT. 1. *Nature of.*
5. *How created.*
6. *Offices incident to others.*
8. *How Offices may be granted.*
13. *Bishops, &c. may grant Offices.*
18. *What Offices may be granted to two persons.*
23. *What estate may be had in an Office.*
39. *What Offices may be granted in Reversion.*
45. *What Offices may be entailed.*
48. *When subject to Curtesy and Dower.*
51. *Some Offices may be assigned.*
SECT. 54. *Who may hold Offices.*
61. *When exerciseable in Person, and when by Deputy.*
72. *What Oaths, &c. required.*
78. *Statutes against selling or buying Offices.*
89. *What Offices are not within this statute.*
94. *Where Equity will interpose.*
98. *How Offices may be lost.*
99. *By Forfeiture.*
107. *By acceptance of an incompatible Office.*
110. *By the destruction of the Principal.*
115. [*How suspended.*]

SECTION I.

Nature of.

AN office is a right to exercise a public or private employment, and to take the fees and emoluments belonging to it; and all offices relating to land, or exerciseable within a particular district, are deemed incorporeal hereditaments, and classed under the head of Real Property.

2. Offices are either public or private; the first are those which concern the general administration of justice, or the collection of the public revenue. Such as the judges of the King's Courts at Westminster, sheriffs, coroners, &c., the commissioners of the customs and excise, &c. The second are those which only concern particular districts belonging to private individuals, such as stewards and bailiffs of manors.

3. Officers are also either judicial or ministerial; the first relating to the administration of justice, and which must be ex-

ercised by persons of sufficient skill and experience in the duties of such offices. The second are those where little more than attention and fidelity are required, to the due discharge of them.

4. There are nine great offices of the crown, and the persons exercising them, who are called the great officers of state, have the titles of lord high steward, lord chancellor or keeper of the great seal, lord high treasurer, lord president of the council, lord privy seal, lord great chamberlain, lord high constable, earl marshall, and lord high admiral. The office of high steward was originally annexed to the manor of Hinckley, in Leicestershire, which was held by grand serjeanty. That of high constable was annexed to certain manors in Gloucestershire, held by the same tenure. That of great chamberlain was held of the king by grand serjeanty in gross. Collins's Claims, 185. 190.

5. All public offices must originally have been created by the Sovereign as the fountain of government. There are however a great number of offices which, having existed time out of mind, are therefore said to be derived from immemorial usage. But Lord Coke says that in consequence of the statute 34 Ed. 1. *De Tallagio non imponendo*, the king cannot erect any new office, with new fees; for that would be a talliage put upon the subject, which cannot be done without the assent of parliament. That this appeared by a petition in Parliament 13 Hen. 4. in which the commons complained that an office was created for measuring of clothes and canvass, with a fee for the same, by colour of the King's letters patent, and prayed that those letters patent might be revoked: for that the King could erect no offices, with new fees to be taken of the people, who may not be so charged but by parliament, and that these letters patent were declared void in the Court of King's Bench and in parliament. Nor can the King annex new fees to old offices; for this would also be a tax upon the public. How created. 4 Inst. 75. 2 Inst. 523. 2 Comm. 572.

6. There are several offices incident to other offices of a superior kind; and grantable by those who hold such superior offices. Thus the lord chancellor, or keeper of the great seal, and the chief justice of the Courts of King's Bench and Common Pleas, have a right of granting several offices in their respective courts. The sheriffs of counties appoint the county clerk, and the *custos rotulorum* appoints the clerk of the peace. Offices incident to others. 2 Inst. 425. 4 Rep. 34 a. Jenk. 216. 4 Mod. 167.

7. There are several ancient offices incident to bishoprics; such as chancellor, commissary, register, &c. which are judicial; and other offices, such as steward, surveyor, park-keeper, &c., which are only ministerial. Where a new bishopric has been created, the bishop has appointed offices of a similar nature.

How offices may be granted. 4 Inst. 75.

8. Ancient offices must be granted in such form and manner as they have used to be; unless the alteration be by authority of parliament. Offices held immediately from the Crown must be granted by letters patent. Each office must be granted with all its ancient rights and privileges, and every thing incident to it. For if any office incident to that which is granted is reserved, the reservation is void. Thus it is said by Lord Holt, that a grant of the office of marshal of the King's Bench prison, to which the office of chamberlain is inseparably incident, with a reservation of the office of chamberlain, was void.

1 Salk. 439. 2 Ld. Raym. 1038.

9. So where an office is incident to another office, such incidental office cannot be granted by the crown, even though the principal office be vacant at the time.

Mitton's case, 4 Rep. 32 b.

10. Queen Elizabeth, by letters patent, granted the office of clerk of the county court of Somersetshire to one Mitton, with all fees, &c. Afterwards the queen constituted Arthur Hopton, esq. sheriff of the same county, who interrupted Mitton, claiming that which was mentioned to be granted to Mitton, to be incident to his office of sheriff; and thereupon appointed a clerk himself of the county court. Mitton complained to the lords of the Council, who referred the consideration of the validity of the grant of the said office to the two Chief Justices, Wray and Anderson, who held conferences with the other justices; all of whom held that the said letters patent were void in law, because the office of sheriff was an ancient office of great trust and authority; and the King could not abridge the sheriff of any thing incident or appurtenant to his office, for the office was entire, and so ought to continue. That the county court, and the entering all proceedings in it, were incident to the office of sheriff; therefore could not by letters patent be divided from it. That although the grant was made to Mitton when the office was vacant, yet it was void; and when the Queen appointed a sheriff, he should avoid it.

11. As to grants of incidental offices by persons holding the superior offices, they must in general be by deed duly executed;

though Lord Coke says a man may be retained as a steward to keep a court baron or a court leet, without deed. And it was held by the Court of King's Bench in 10 Will. III. that an appointment of a clerk of the peace of a county, by the *custos rotulorum*, by parol, was good; because it enured as an execution of a power: for whatever is to take effect out of a power or authority, or by way of appointment, is good without deed: otherwise where it takes effect out of an interest.

1 Inst. 61 b.

Saunders v. Owen, 2 Salk. 467. 1 Ld. Raym. 158. 12 Mod. 199. Colles Parl. Ca. 70.

12. If a house or land belong to an office, by the grant of the office by deed, the house or land will pass as belonging to it.

1 Inst. 49 a.

13. The restraints imposed upon bishops, and other ecclesiastical persons respecting the alienation of property whereof they are possessed in right of their churches, do not extend to grants of offices; so that their rights in this respect remain as they were at common law. From which it follows that bishops and other ecclesiastical persons may grant judicial offices, for the lives of the grantees, which will bind their successors; provided such grants be made and confirmed in the manner required before the disabling statute 1 Eliz. c. 10. s. 5. was passed.

Bishops, &c. may grant offices.

14. Thus it was resolved in the bishop of Salisbury's case, 11 Ja. 1. that where an office was ancient and necessary, the grant thereof with the ancient fee was not any diminution of the revenue, or impoverishing of the successor; therefore, for necessity, such grants were by construction excepted out of the general restraint of the statute 1 Eliz. And if bishops should not have power to grant offices of necessity, for the life of the grantees, but that their estate should depend upon uncertainties, as upon the death, translation, &c. of the bishop; then the most able persons would not serve them in such offices, or at least would not discharge their offices with any alacrity.

15. It was also resolved in the same case, that where a new bishopric was erected, a grant of offices of necessity, with a reasonable fee, the reasonableness of which should be decided by a court of justice, would be good.

16. With respect to grants of honorary, or ministerial offices by bishops, it has been resolved in the following case that offices which existed before the stat. 1 Eliz. are not within the restraints of that statute, but that they may be granted as before; and that the utility or necessity of the office is not more material since than it was before that statute.

Trelawny v. Ep. Winton, 1 Burr. 219.

17. Sir J. Trelawny brought an action of debt against the bishop of Winchester, for five years' salary of several offices; *viz.* great and chief steward of the bishopric, and of all its castles, lordships, manors, &c.; conductor of the men and tenants of the bishop, with a salary of 100*l. per annum;* master-keeper or preserver of the wild beasts, in all the forests, parks, chases, and warrens, belonging to the bishop; and chief governor of all birds, fish, and beasts of warren, &c. commonly called chief parker, with a salary of 20*l. per annum.* Which offices and salaries were granted to the plaintiff by the late bishop of Winchester by letters patent, with a clause of distress if unpaid. The bishop pleaded the statute 1 Eliz. c. 19. s. 5., and also that the offices aforesaid were not ancient offices of the bishopric, nor were usually granted for life; that the said fees were not the ancient fees; that the said offices were useless and merely nominal, no duty or service being to be done for or in respect of them.

The jury found a special verdict, that the offices of chief steward and conductor of the men, &c. were ancient offices of the bishop, and had been anciently and usually granted for life, with an annuity; that the annuity of 100*l.* was the ancient fee; that the same were granted to the plaintiff by Jonathan, late bishop of Winchester; which grant was approved by the dean and chapter, and confirmed by them. They then found the statute 1 Eliz., and that these offices, at the time of making that act, and since, were merely nominal; no duty, attendance, or service being to be done for or in respect of them. And as to the office of master-keeper of all beasts in the parks, or chief parker, they found that it was not an ancient office.

The question on this special verdict was, whether Sir J. Trelawny was entitled to hold the two first mentioned offices, and to recover the arrears against the bishop. As to the office of chief parker, the facts found by the special verdict made an end of any question concerning it, and the point was given up.

Lord Mansfield said,—At common law a bishop, with the confirmation of his dean and chapter, might exercise every act of absolute ownership over the revenues of his see, and bind his successors as much as tenant in fee could bind his heir. Then came the restraining statute 1 Eliz. But patents or grants of offices, with fees, salaries, or profits annexed to them, were not

mentioned in that act. There were no general words adapted to the case of offices; yet there was not a single bishopric at that time without some offices granted. Had the Legislature meant to restrain the regranting them, as they should drop in, it must have been done by a special provision; with an exception of some at least of judicial offices. As the general restraint was not extended to the case, there was no occasion to make exceptions. Continuing ancient offices with the ancient fee, in the usual manner, was not a dilapidation of the revenue of the bishopric; every bishop left this power to be exercised by his successor, as his predecessor left it to be exercised by him; such grants being no new charge upon the bishopric, which only remained liable to the same fees or salaries to which it was liable before. And after stating several cases, he concluded in these words:—"The office in question in this case is found never to have been more useful or necessary than it is now; yet all the bishops of Winchester, from the 1 Eliz., have thought the grants of it valid; every succeeding bishop has submitted to the grant made by his predecessor; and the greatest men of the kingdom, or the nearest relations of the bishop, have successively held the office. The present bishop thought this grant good for eleven years, but has conceived a doubt, from the misapplication and repetition of inconclusive and contradictory arguments about the office being necessary; whereas we are all unanimously of opinion that an office and fee which existed before the 1 Eliz. is not within the statute; but may be granted since, precisely in the same manner in which it was granted before: that the utility or necessity of such an office is no more material since the 1 Eliz. than it was before. This opinion we think agreeable to the words and intent of the act, and every precedent since the statute: therefore there must be judgment for the plaintiff."

What offices may be granted to two persons.

18. Ministerial offices, requiring only common skill and diligence, may be granted to two persons; and so may also some judicial offices established by act of parliament. But an ancient judicial office cannot be granted to two persons. Thus, King Henry VI. having granted the office of high admiral to the Duke of Exeter and his son, the judges held it to be void, the charter being of a judicial office; for such ancient offices must be granted as they formerly had been.

4 Inst. 146.

2 Wm. & Mary, st. 2. c. 2.

19. A grant to two persons to be Chief Justices of any of the

11 Rep. 3 b.

courts at Westminster would be void: but as to offices incident to the King's courts at Westminster, it seems to be in the discretion of the Judges, if they see that an office in their courts comprehends too much for one man to execute, to join another person with him. In such a case it must, however, be still granted as one office; for if it is divided into two or three offices, the prescription is interrupted, and it is not a grant of the ancient office.

20. Ecclesiastical offices, though of the judicial kind, may be granted to two persons, where there has been a usage of granting them in that manner.

Jones v. Bew, Carth. 213. 4 Mod. 16. 1 Show. 289.

21. The bishop of Llandaff granted the office of chancellor or commissary of his diocese to two persons, to hold the same *conjunctim et divisim*, to them and the survivor of them. It was agreed by the counsel on both sides, that this office had been anciently and usually granted in this manner. On a case stated out of Chancery, and referred to the Court of King's Bench, the question was, whether this was such a judicial office as could be granted to two persons. Resolved, that it was a good grant, because of the long and constant usage. And it was said, that the offices of most of the bishoprics in England were and had been constantly so granted.

1 Salk. 465.

22. Salkeld reports, that in this case the Court said, if an office be granted to two, and one dies, the office does not survive, but determines. As if there are two sheriffs, and one of them dies, the other cannot act: otherwise, if granted to two and the survivor of them.

What estate may be had in an office. Dyer 285.

23. With respect to the estate or interest which may be had in an office, several of the great officers of state were, and still continue to be, hereditary. Thus, the office of earl marshal was held by the Earl of Pembroke in fee simple, and is now held by the Duke of Norfolk in the same manner. The office of lord great chamberlain was held by the De Veres, Earls of Oxford, in fee simple; from whom it descended to the Dukes of Ancaster in the same manner; and upon the death of Robert Duke of Ancaster in 1779, without issue, it descended to his two sisters.

24. Although the offices mentioned in the last section are called offices in fee, yet the estate in them is not, strictly speaking, an estate in fee simple; for it is only inheritable by the

lineal descendants of the first grantee of the office; not by any collaterals.

25. The offices of sheriff, gaoler, park-keeper, or forester, steward, or bailiff of a manor, have also been granted in fee simple. And it is held, that where an office may be granted in fee, it may be granted for life; or to one for life, remainder to another for life. 2 Inst. 382. 9 Rep. 48 b. 97 b. 3 Barn.& Cress. 616.

26. With respect to judicial offices, they cannot, in general, be granted for a greater estate than for life; because they are only exerciseable by persons of skill and capacity.

27. If an office be granted to a person *quamdiu se bene gesserit*, the grantee has an estate for life. For as nothing but misconduct can determine his interest, no one can prefix a shorter time than his life, since it must be by his own act, which the law will not presume that his estate can determine. If the words be, *quamdiu se bene gesserit tantum*, the estate will not be abridged by the addition of the word *tantum*. 1 Inst. 42 a. 1 Roll. Ab. 844. Harcourt *v.* Fox, 1 Show. 491. Id.

28. [And so *e converso* where an office is granted for life, there is an implied condition that it shall continue in the grantee enly *quamdiu se bene gesserit.*] Lit. s. 378. Co. Lit. 233 b. 3 Barn. & Cress. 619. Bartlett *v.* Downes.

29. The Judges of the several courts at Westminster formerly held their offices *durante bene placito*. By the stat. 13 Will. 3. c. 2. it was enacted, that their commissions should be *quamdiu se bene gesserint*: but that it should be lawful to remove them on an address of both houses of parliament. Now, by the stat. 1 Geo. 3. c. 23. the Judges are continued in their offices during their good behaviour, notwithstanding any demise of the Crown: but may be removed on an address of both houses of parliament.

30. Offices which do not concern the administration of justice, and only require common skill and diligence, may be granted for years; because they may be executed by deputy, without any inconvenience to the public.

31. The office of register of policies of insurance in London was granted by the King for years; and adjudged to be a good grant, because it did not concern the adminstration of justice, but only required the skill of writing after a copy. Vale *v.* Priour, Hard. 351. Jones *v.* Clerk, Hard. 46.

32. Offices of this kind may be granted to one person in trust for another; and the Court of Chancery will compel the execution of such a trust. Bellamy *v.* Burrow, Forrester 97.

33. No office of trust, requiring skill and capacity in the execution of it, can however be granted for years.

Reynel's case, 9 Rep. 95.

34. King James I. granted the office of marshal of the Marshalsea for thirty-one years. It was held by the Lord Chancellor and four of the Judges, that the grant was void; because this was an office of great trust annexed to the person, and concerned the administration of justice: that this trust being individual and personal, should not be extended to executors or administrators; for the law will not repose confidence, in matters concerning the administration of justice, in persons unknown.

Sutton's case, 6 Mod. 57.

35. It was determined in a subsequent case, that the office of marshal of the King's Bench might be granted to a person for years, determinable on the death of such person; for in that case the office could not go to executors or administrators.

2 Show. R.171.

36. Lord Hale is said to have been of opinion that an office of trust might be granted for years; for that the true reason of the determination in Reynell's case was, that the custom had been to grant it in fee. Lord Chancellor Finch is reported to have said that an office may be granted for years, for the same inconveniences attend an office in fee; and a person unknown and unfit, as an infant or feme covert, may happen to have the same, under an estate of inheritance.

9 Rep. 97 a.

176 a.

37. Offices may also be granted at will. In Reynel's case, the Judges said that the office of marshal of the Marshalsea had always been granted for life, or at will. And there is a precedent in Dyer of a grant by the King of the office of Chirographer of the Common Pleas, to hold as long as it should please his Majesty.

1 Inst. 42 a.

38. If the King grants an office to hold at will, and grants a rent to the officer for life, for the exercise of the office; this is not an absolute estate for life, because the rent being granted on account of the office, and for discharging the duties of it, whenever the grantee's interest in the office ceases, the rent is determined.

What offices may be granted in reversion. Howard v. Wood. 2 Show. R. 21.

39. Ministerial offices, and also offices exercisable by deputy, may be granted in reversion, or rather to commence *in futuro:* and to take effect in possession upon the death of the person then holding the office.

Rex v. Kemp, 2 Salk. 465. Skin. 446.

40. The King granted an office to a person *durante bene placito;* afterwards granted the same office to another person for

life; to commence from the death, surrender, or forfeiture, of the first grantee. It was objected that the second grant was void, for the first estate being at will, could not be surrendered or forfeited; and that an estate of freehold could not depend on an estate at will.

The Court said, 1. That an estate at will in lands could not be surrendered, because it was determinable at the will of either party: but an office was not properly at the will of both parties, but at the will of the King only; for the grantee could not determine his will but by surrender. 2. It might be said to be forfeitable in some measure, and the King's tenants at will may be said to forfeit; for, in the case of forfeiture, the King would be informed by inquisition, before he determined his will; then upon the return of the inquisition, the office would be forfeited. 3. A freehold estate in lands could not be granted to commence *in futuro*, or depend on an estate at will: but a new office might be created, to commence *in futuro;* for it was the creature of him who made it, and was no otherwise in being than it was in grant. The King did not grant a reversion but *in* reversion; and that not in respect of a particular estate, but because he was pleased to grant *in futuro.*

41. An ecclesiastical office of the judicial kind may be granted in reversion, where there is a custom and usage to support such a grant.

42. The office of Register of the Bishop of Rochester was granted to a person, to hold from the death or surrender of him who then held it for life, to be exercised by the grantee or his sufficient deputy. Resolved, that the grant was good; for although there was no reversion of an office, unless it was an office of inheritance, yet it might well be granted in reversion, *habendum* after the death of the then present officer; it being no more than a provision of a person to supply it, when it became void: and where such provision had been usually made, the custom and usage gave it a sanction.

Young *v.* Stoell, Cro. Car. 279. 2 Roll. Ab. 153.

Walker *v.* Lamb, Cro. Car. 258. 1 Inst. 3 b.

43. But where there is no custom or usage to warrant it, a judicial office cannot be granted in reversion.

44. King James I. granted the office of Auditor of the Court of Wards to two persons, to hold immediately from the death of the two persons who then held the office. Resolved, that this grant was void, because it was of a judicial office: and as none

Curle's case, 11 Rep. 2.

can give any judgment of things which may happen *in futuro*, so none can be a judge *in futuro*; and the rule was, that *officia judicialia non concedantur antequam vacent.* For he, who at the time of the grant in reversion may be able and sufficient to supply the office of judicature, before the office falls, may become unable and insufficient to perform it.

Savage's case, Dyer 259.

What offices may be entailed. Tit. 2. c. 1.

45. All those offices which are of a real nature, and grantable in fee simple, may be entailed within the statute *De Donis*, because they are demandable in a *præcipe ut tenementa.* And Lord Coke says, the office of earl marshal was entailed, as also the office of one of the chamberlains of the exchequer. So the offices of steward, receiver, or bailiff of a manor, or that of a forester, may be entailed, because they are exercisable within lands.

7 Rep. 33 b. 1 Roll. Ab. 838.

46. Where an office is unalienable, though it may be granted in tail by the Crown, as in the case of the office of earl marshal, yet it cannot be entailed by the person possessed of it. This point was fully discussed in the following case.

Collins's Claims, 181. Anno 1626.

47. John De Vere, Earl of Oxford, being seised in fee simple of the office of great chamberlain of England, in 4 Eliz. by deed, covenanted with the Duke of Norfolk and others, that he, his heirs, and assigns, would from thenceforth stand seised thereof, to the use of himself for life, remainder to Lord Bulbeck, his son, and the heirs male of his body. Robert Earl of Oxford claimed the office under this entail, as heir male of the body of Lord Bulbeck, and Lord Willoughby claimed the same as heir general.

Lord Chief Justice Crew delivered his opinion that the office was entailable within the statute *De Donis;* but a majority of the other Judges, amongst whom was Mr. Justice Dodridge (a part of whose argument may be seen in Collins), gave their opinion, that this high office was inherent in the blood of the first grantee, incapable of alienation, and therefore could not be entailed by any person seised of it.

In consequence of this opinion, the Lords certified in favour of Lord Willoughby as heir general, and he was allowed to exercise the office.

When subject to curtesy and dower. 1 Inst. 29 a.

48. Curtesy is incident to offices of inheritance. Thus Lord Coke has cited a record, from which it appears that John Duke of Lancaster was allowed to exercise the office of seneschal of

England, at the coronation of King Richard II., as tenant by the curtesy.

49. At the same coronation, John Dymock claimed the office of king's champion, as tenant by the curtesy, and was admitted to exercise it accordingly. Collins's Claims, 5.

50. A woman may be endowed of an office of inheritance, as of the office of marshal of the Marshalsea, to have the third part of the profits. But in such a case, she must contribute a third part of the charges; as also of the third part of the profits of the office of keeping the goal of the abbey of Westminster. 1 Inst. 32 a.

51. Where an office is granted to a person and his heirs, or to a person and his assigns, for his life, it may in some cases be assigned. Thus Jenkins states it to have been held by all the judges in the Exchequer Chamber, that when the office of chamberlain of the exchequer was granted to A. and his assigns, A. might assign it, but could not make a deputy, without special words to enable him. Some offices may be assigned. Cent. 3. ca. 89. Plowd. 378. 9 Rep, 48 b. Hob. 170.

52. There is, however, great obscurity in the books respecting the assignment of offices. In a case reported by Hardress, the question was, whether the office of teller of the exchequer, which had been granted to a man, *habendum* to him and his assigns, during his life, could be assigned. Serjeant Glynn contended that the office was assignable, by reason of the word assigns in the patent: but else, it would not have been assignable, being an office of trust, which concerned the king in his revenue. That some offices were in their nature assignable, without the word assigns, and some not; as a parkership was an office assignable in its nature, being an office of profit. Others were not, *viz.* offices of public trust, as the office in question. So offices granted to men and their assigns were assignable; and there was no inconvenience in such a case; for if assigned to an unfit person, the Court would refuse to admit him. Sir Heneage Finch argued on the other side,—1. That the office was not assignable, without the word assigns; because it was an office of great and public trust. 2. That the *habendum* did not alter the thing, it being in the King's case; for it would be inconvenient that the King should have an officer in such a place put upon him against his will; and *habendum* to him and his assigns was no other than if it had been to him and his heirs, which would have Dennis v. Loving, Hard. 424.

been void. In Hatton's case, the office of a garbler granted to one with power to make a deputy did not extend to an assignee, because it was an office of trust. There was no precedent of an assignment of such an office.

No judgment was given in this case, the King having stopped the proceedings by a writ *De Rege inconsulto.*

Drummond v. St. Albans, 5 Ves. 433.

53. In a modern case it was held, that the office of Register of the Court of Chancery was assignable.

Who may hold offices. 1 Inst. 3 b. Jenk. 121.

54. It is laid down by Lord Coke, that "if an office, either in the grant of the King or of a subject, which concerns the administration, proceeding, or execution of justice, or the King's revenue, or the commonwealth, or the interest, benefit, or safety of the subject, or the like, be granted to a man that is inexpert, and hath no skill and science to exercise or execute the same, the grant is merely void, and the party disabled by law, and incapable to take the same, *pro commodo Regis et populi;* for only men of skill and knowledge, and ability to exercise the same, are capable of them, to serve the King and his people."

Vintner's case, Bro. Ab. Tit. Office, pl. 48. Dyer 150.

55. King Edward IV., by letters patent, appointed Thomas Vintner to be clerk of the Crown. The judges of the Court of King's Bench, with the assent of the judges of the Court of Common Pleas refused him; because he was not exercised in his office, nor in any other in the Court, as he ought by a long time, and so declared to the King. Upon which the King, by the advice of the justices, appointed one John West clerk there, who was expert, and sent to the said justices his letters under his signet, which, after, were enrolled in the same Court, that they rejected Vintner, and admitted West.

Sutton's case, Cro. Car. 65.

56. A clergyman was made chancellor to a bishop, and confirmed by the dean and chapter: but because he was not learned in the canon and civil law, he was removed by the ecclesiastical commissioners; though it was insisted that he had a freehold, and therefore had prayed a prohibition, yet it was denied.

Jenk. 121.

57. A grant of an office requiring skill, to an infant, to be exercised *in præsenti,* is void. But if it is to be exercised *in futuro,* and that he is of full age and expert when the office is to be exercised, the grant is good.

Young v. Stoell, Ante, s. 42.

58. Where, in the grant of an office, it is expressly said, that it shall be exerciseable by deputy, the grantee need not

have such skill and knowledge as is necessary to the execution of the office.

59. Offices merely ministerial, which do not require particular skill and knowledge, and exerciseable by deputy, may be granted to any person, and even to women. Thus, a woman may have the office of the custody of a castle. And Lord Coke mentions an instance of a woman's having the office of a forester in fee simple; but he observes, that she could not execute the office herself, but was obliged to appoint a deputy, during the eyre, who should be sworn.

Lady Russel's case, Cro. Jac. 17.
4 Inst. 311.

60. The office of high constable was held by the daughter of Humphrey De Bohun, Earl of Hereford and Essex. The office of steward of England was held by Blanch, daughter of Henry Earl of Lancaster, in whose right John of Gaunt enjoyed the same. The office of Earl Marshal was held by a female, through whom it passed to the house of Norfolk. And the office of great chamberlain of England is at this moment held by the two sisters and co-heirs of Robert, late Duke of Ancaster.

Collins's Claims, 119.

Infra, s. 68.

61. Offices which concern the administration of justice, such as those of judges of the King's Courts at Westminster, &c. must be exercised in person, and not by deputy. There is, however, one exception to this rule; for sheriffs, though their office concerns the administration of justice, may notwithstanding appoint deputies, by the name of undersheriffs. There are also some offices of the judicial kind, in the creation or grant of which is contained a power of appointing a deputy. Thus the Chief Justices in Eyre may appoint deputies, by the express words of their patents, to exercise the office for them.

When exercisable in person, and when by deputy.

62. A ministerial office, which is to be exercised by the grantee in person, cannot be done by deputy. Thus it is said in Dyer, that the office of carver, being an office of trust, cannot be exercised by deputy. But ministerial offices, which are not of trust, and do not require any particular skill, may in general be exercised by deputy. And all offices which may be assigned may be exercised by deputy.

7 b. pl. 10.

Shrewsbury's case, 9 Rep. 46.

63. Lord Coke says, there is a great difference between a deputy and an assignee of an office. For an assignee is a person who has an estate or interest in the office itself, and does all in his own name, for whom his grantor shall not answer, unless it be in special cases. Whereas a deputy has no estate or interest

Idem, 48 a.

in the office, but is the officer's shadow: he does all things in the name of the officer, and nothing in his own name; and for whom his grantor shall answer.

Wheeler *v.* Trotter, 3 Swan. 174. 177. *in notis.*

64. [And it would seem that the office of the deputy is revocable at any time by his principal.]

Parker v. Kett, 1 Ld. Raym. 658.

65. A deputy cannot in general make a deputy; for a deputy being only authorized himself, cannot delegate his authority to another. But it has been held, that a steward of a manor, who is authorized to exercise the office by himself or his sufficient deputy, may enable another person to take a surrender of a copyhold out of Court.

1 Inst. 107 b.

66. Offices of inheritance may be exercised by deputy, in case the persons entitled for the time being are incapable of exercising them in person; as where such offices descend to infants or women, or to a person under the rank of a knight: thus the office of high constable has been exercised by deputy.

Keilw. 171 a.

Buckingham's case, Dyer 285 b. 1 Inst. 165 a.

67. Humphrey de Bohun, Earl of Hereford, held the manors of Harlesfield, &c. of the King, by the service of being constable of England; and had issue two daughters. Upon a question how the daughters, before marriage, could exercise the office; it was resolved that they might make their sufficient deputy to do it for them; and after marriage the husband of the eldest might do it alone.

2 Bro. Parl. Ca. 146.

68. In the case respecting the office of great chamberlain of England, which was heard in the House of Lords in 1782, Lady Willoughby de Eresby (the wife of Mr. Burrell, since created Lord Gwydyr,) who was the eldest of the two sisters and coheirs of Robert Duke of Ancaster, claimed the office. It was contended on her part, that if there was any ground to say that the office had descended to both the sisters, still the right to exercise the office belonged to Mr. Burrell, as the husband of the eldest, it being an hereditary office in gross, held in grand serjeanty; and in the case of co-heirs, when the eldest happened to be a feme covert, was to be executed by her husband. That this was perfectly agreeable to, and warranted by, the usage in all such great offices as had in the course of time descended to heirs general. The office of steward of England had descended in two instances to the eldest daughter. The office of constable of England had come to Humphrey de Bohun, by his marriage with the eldest daughter of Milo Fitzwalter. The office of earl marshal of England came to Roger Bigot, Earl of Norfolk, in

Ante, s. 23.

right of his mother Maud, who was the eldest daughter of William Marshall, Earl of Pembroke.

The following question was put to the judges:—"The late Duke of Ancaster having died seised of the office of great chamberlain of England, leaving Lady Willoughby de Eresby and Lady Charlotte Bertie his sisters and coheiresses; does the said office belong to the eldest alone, or to both: or in either case is the husband of the eldest entitled to execute the said office, or may both sisters execute it by deputy; and how must such deputy be appointed? Or does it devolve upon the King to name a proper person to execute the office, during the incapacity of the heir?" Lords' Journ. Vol. XXXVI. 302.

The judges delivered their unanimous opinion,—"That the office belonged to both sisters; that the husband of the eldest was not of right entitled to execute the said office. That both sisters might execute it by deputy, to be appointed by them; such deputy not being of a degree inferior to a knight, and to be approved of by his Majesty."—The Lords certified accordingly; and Mr. Burrell, being created a knight, was appointed deputy.

69. A deputy is accountable to his principal for the fees and emoluments of the office. And in a case in 3 Ann. it was said by the Court of King's Bench, that if one reserve a sum certain, upon a deputation out of the profits or fees of an office, he only reserves part of that which was wholly his before; for though by making a deputy, the whole power of the principal is in the deputy, yet the fees or profits do not pass, and the deputy has no right to them. Then if he makes a deputy, reserving a sum certain, part of the profits, and the rest to the deputy, he may well do it, for it is but reserving part of what was wholly his. Godolphin v. Tudor, 6 Mod. 234. 1 Bro. Parl. Ca. 135. Infra. Garforth v. Fearon, 1 H. Black. R. 327.

70. [Where an office of justice or profit is held in trust, the acts of a majority of the *cestuis que* trust may bind the rest.

71. In the case of Younger and Welham (Trinity T. 1711) it appears that the office of register of the Prerogative Court was assigned upon trust for four *cestuis que* trust; the trustees covenanting not to appoint any officer, &c. without the direction of *cestuis que* trust. One Norris was made assistant without the privity of three of the *cestuis que* trust, but with the consent of the fourth. Norris was enjoined not to act any longer. It was urged by Peere Williams that all the *cestuis que* trust ought to agree in nominating, or else nobody could be nominated; and Ld. Colchester's MSS. 3 Swan. 180. in notis.

the rather because the place was within the statute, and, therefore, could not be sold, or the nomination any profit; but in case of profit he allowed a majority should bind. Lord Keeper Harcourt. Shall the three lose their right because a fourth will not agree? a majority is sufficient.]

What oaths, &c. required.

72. With respect to the oaths required to be taken, and the ceremonies to be performed, as qualifications for holding offices; it is enacted by the stat. 13 Cha. 2. c. 1. s. 12., that no person shall be chosen to any office of magistracy, place of trust, or other employment, relating to the government of any city, corporation, borough, cinque port, or other port town, who shall not have received the sacrament according to the rights of the church of England withing one year next before such election; and that every person so placed or elected shall take the oaths of allegiance and supremacy.

73. By the stat 25 Cha. 2. c. 2. commonly called the test act, it is enacted, that every person who shall bear any office civil or military, by reason of any patent or grant from his Majesty, must take the oaths of allegiance and supremacy and test; and receive the sacrament within three months: in case of neglect, he shall be disabled to hold the said offices, &c. and forfeit 500*l.*

2 Barn. & Cress. 34.

An act is passed regularly every year to indemnify persons holding offices, who have neglected to qualify themselves according to the provisions of this statute.

74. By the stat. 5 Geo. 1. c. 6., it is enacted, that all persons in the actual possession of any office, that are required by the test act (*a*) to take the sacrament, &c., shall be confirmed to their respective offices, and none of their acts be questioned, notwithstanding their omission to take the sacrament; nor shall they be removed, or otherwise prosecuted, for or by reason of such omission, unless such person be removed, or such prosecution commenced, within six months after the election.

Crawford *v.* Powell, 2 Burr. R. 1013. See stat. 9 Geo. 4. c. 17. s. 8.

75. The intention of the test act was to exclude persons who were not of the church of England from all offices which concern the government: and is to be considered prohibitory on the

(*a*) [The statute 9 Geo. 4. c. 17. repeals so much of statutes 13 Car. 2. st. 2. c. 1.; 25 Car. 2. c. 2.; 16 Geo. 2. c. 30. as imposes the necessity of receiving the sacrament of the Lord's Supper as a qualification for certain offices and employments.]

electors, *quoad* such persons. A dissenter being therefore ineligible to such offices, cannot be fined for refusing to accept of them.

76. The corporation of the city of London, by a bye law, imposed a fine of 600*l.* upon every person who, being elected, should refuse to serve the office of sheriff. The chamberlain of London levied debt on a person named Evans, for the penalty of his refusal to serve the office of sheriff; who pleaded the statute 13 Cha. 2., averring that he was a Protestant Dissenter, within the toleration act, of scrupulous conscience, and therefore had not received the sacrament. The plaintiff replied, urging the 5 Geo. 1. which confirms members of corporations in their respective offices, though they have not received the sacrament. To this the defendant demurred: and judgment was given in favour of the city; but reversed by a special commission; and the reversal affirmed by the House of Lords.

Harrison *v.* Evans, 3 Bro. Parl. Ca. 465. Wilmot 130.

Ante, s. 74.

77. [In the recent case of Rex *v.* Bower it was decided that the mere payment of a fine for not serving an office does not operate to discharge the party paying it, from the obligation to serve where the bye-law does not declare that such fine shall be in lieu of service.]

1 Barn. & Cress. 585. and 2 D. & R. 842.

78. It is enacted by the stat. 5 & 6 Edw. 6. c. 16. that all persons who shall sell any offices, shall lose and forfeit all their right, interest, and estate, in such offices, and in the gift and nomination thereof. And that all persons who shall purchase such offices shall be disabled from occupying or enjoying the same; and that all such bargains shall be void, with a proviso that all acts of persons offending against this statute, done before they are removed from their offices, shall be good and valid.

Statutes against selling or buying offices. See also 49 Geo. 3. c. 126.

79. This statute extends to ecclesiastical, as well as to temporal offices, which concern the administration and execution of justice. Thus it was resolved, in the case of Doctor Trevor, chancellor of a bishop in Wales, that both the office of chancellor, and that of register, of a bishop, were within the statute; because they concerned the administration of justice. Croke in his report of that case says, it was held that although such offices concerned matters principally *pro salute animarum*, yet they also concerned matters about matrimony, and legitimacy, which touched the inheritance of the subjects.

3 Inst. 148.

Trevor's case, Cro. Jac. 269.

way of indemnity, to the plaintiff, the profits and emoluments of his place; and that whenever he should become possessed of any other office of trust, commission, place, or pension, whatsoever, he would assign such office, &c. to the plaintiff, who was to take the whole profits. It was contended that the agreement was void for the purpose of assigning all offices, &c. and that offices of trust could not be legally assigned. Lord Mansfield over-ruled the objection, observing, that the agreement was for the assignment of all offices which might legally be assigned. The profits arising from the office of private secretary to Lord Holdernesse might be assigned, and as to all others, they were not within the present case.]

93. By the statute 49 Geo. 3. c. 12. it is enacted, that all the provisions of the stat. 5 & 6 Edw. 6. shall be extended to Scotland and Ireland. And that when the interest of any person shall be forfeited under that act, or this act, the right of such appointment shall immediately vest in and belong to the Crown.

Where equity will interpose.

Treat. of Eq. B. 1. c. 4. s. 4.

94. As the provisions of this statute do not extend to all the cases within the mischief which it was intended to prevent, courts of equity have frequently interposed; for though penal laws are not to be extended, as to penalties and punishments, yet if there be a public mischief, and a court of equity sees private contracts made to elude laws enacted for the public good, it will interpose.

Morris v. M'Cullock, Amb. 432.

95. A person gave a sum of money to another for procuring him a commission in the marines. Lord Henley decreed the bargain void; and said—"I lay down this rule, that if a man sells his interest, to procure a permanent office of trust or service under government, it is a contract of turpitude; it is acting against the constitution, by which the government ought to be served by fit and able persons, recommended by the proper officers of the Crown, for their abilities, and with purity."

Hanington v. Du Chatel, 1 Bro. C. C. 124.

96. Lord Rochefort being groom of the stole to his Majesty, and having the right of recommending pages of the presence, treated with the plaintiff's testator, to recommend him upon a vacancy, on condition that he should grant two annuities to particular persons. An action being brought on the bonds securing these annuities by the defendant's testator, for the arrears of the annuity, the plaintiffs filed their bill for an injunction. The defendants had demurred, and the demurrer had been over-ruled.

they all belong to him; though a share is to be allowed out of them to the deputy for his trouble. But where an auditor of Wales appointed a deputy; and it was agreed between them that the deputy should receive all the fees, &c. and pay the principal a certain sum of 200*l.* per annum, this was held void. (*a*)

Parsons *v.* Thompson, 1 H. Bl. 322.

87. [And as a public office relating to the administration of justice cannot be sold; so neither can its profits and emoluments be assigned as a security for the debts of the officer.

88. Thus in the recent case of Palmer *v* Bate, the Clerk of the Peace for the City and Liberty of Westminster, which office he held for life, assigned the emoluments and profits of the office to two trustees upon trust thereout to pay the salary of the deputy, the expences of the office and of the trust, and in the next place for securing certain debts, and to pay the surplus to the assignor. The Court of C. B. upon a case sent by Sir John Leach, V. C., decided that the assignment was invalid.]

2 Bro. & B. 673.

89. By the fourth section of this statute it is provided, that it shall not extend to any offices whereof any person shall be seised of an estate of inheritance, nor to any office of parkership, or of the keeping of any park, house, manor, garden, chase, or forest. And by the seventh section it is provided, that this act shall not be prejudicial to the Chief Justices of the King's Bench and Common Pleas, or to any of the justices of assise, touching or concerning any offices to be given or granted by them.

What offices are not within this statute. Willes R. 241.

90. The offices of the sixty clerks in Chancery are not within this statute, nor the office of bailiff of a hundred; for it is not an office of trust, nor does it concern the administration of justice.

Godbolt's case, 4 Leon. 33.

91. This statute does not extend to commissions in the army. And it was formerly held, that the office of purser of a ship of war was not within it. But Lord Mansfield has said, that if the Lords of the Admiralty were to take money for their warrant to appoint a person to be purser, it would be criminal in the corrupter and corrupted.

Prec. in Cha. 199. Symonds *v.* Gibson, 2 Vern. 308. 5 Burr. 2698. 1 H. Bl. 326. Vide stat. 19 Geo. 3. c. 12.

92. [Neither is the office of a private Secretary within the statute of Edw. 6. In Harrington *v* Kloprogge, the defendant was private secretary to Lord Holdernesse, and agreed to assign, by

2 Brod. & Bing. 678, in note. S. C. 2 Chitty's Ca. Tem. Mansfield, 475.

(*a*) [See also Waldo *v.* Martin, 4 Barn. & Cress. 319. Greville *v.* Atkins, 9 ib. 462. Palmer *v.* Vaughan, 3 Swan. 173.]

forfeiture of their offices. So if a forester or park-keeper fell and cut down wood, unless for necessary brush, it is a forfeiture of their offices; for destruction of vert is destruction of venison. As to non-user (*a*), there is a difference: when the office concerns the administration of justice, or the commonwealth, and the officer *ex officio*, or of necessity, ought to attend without any demand or request, there the non-user or non-attendance in court is a forfeiture. As the office of chamberlain in the Exchequer, prothonotary, &c. in the Common Pleas, &c.; for the attendance of these and the like officers is of necessity, for the administration of justice. So the attendance of the clerk of the market is of necessity for the common wealth: so of holding the sheriff's tourn. But when the officer ought not to attend or exercise his office, but on demand or request to be made by him to whom he is officer, there, non-user or non-attendance is no cause of forfeiture, without demand or request made. But when the office concerns any man's private property, and the officer ought, *ex officio*, to attend his office without request, there the non-user or non-attendance is no cause of forfeiture; unless the non-user or non-attendance is cause of prejudice or damage to him whose officer he is, in something which concerns his charge. As if a parker, or *custos parci*, does not attend one or two days, and within these days no prejudice or damage happens, it is no forfeiture: but if, by reason of his absence, persons unknown kill any deer, it is a forfeiture of his office. As to refusal, it is to be known, that in all cases when an officer is bound upon request to exercise his office, if he do it not upon request, it is a forfeiture. As if the steward of a manor is requested by the lord to hold a court, which he does not, it is a forfeiture."

Vaux v. Jefferon, Dyer 114 b.

101. A filazer of the Court of Common Pleas was absent from his office during two years, and farmed it from year to year, without leave of the Court, for which he was discharged, and no record of the discharge was entered on the roll. Upon his bringing an assise, this was held a good discharge.

7 Rep. 34 b.

102. If a tenant in tail of an office commits a forfeiture, it shall bind the issue by force of the condition *tacitè* annexed by law to such estate. But if an officer for life commits

(*a*) [Whether non-user is a cause of forfeiture of a public office, in general depends on the nature of the office, the time of non-user, and several circumstances. 2 Ves. Jun. 6. per Sir Dudley Ryder, Lord C. J.]

a forfeiture, this shall not affect the person entitled to the inheritance.

103. If the deputy of an office in fee does any act by which the office is forfeited, the inheritance of the office is thereby lost. But if a person having an office of inheritance, leases it for life, and the lessee commits a forfeiture, this shall not operate as a forfeiture of the inheritance. Bro. Ab. Tit. Deputy, pl. 7. 2 Lev. 71. 3 —— 288.

104. It has been held in some cases, that where there are two joint officers, the forfeiture of one is a forfeiture of the other; for both are one and the same officer, and the office is entire. It has, however, been determined, that where an office is granted to two, and one of them is attainted of treason, the other shall not forfeit. Bro. Ab. Tit. Office, pl. 51.

105. Sir E. Nevill, and Henry Nevill his son, were keepers of Alyngton Park, with a certain fee, during their lives, and the life of the longest liver of them. Sir E. Nevill was attainted of treason. The question was, whether the King should have the office by the attainder. Resolved, that being only an office of skill and confidence, the same was not forfeited to the King; but that the survivor should hold the same during his life. Nevill's case, Plowd. 378.

106. Where an ecclesiastical office is forfeited, the benefit of it goes to the King, as supreme ordinary. And where a principal officer is authorized to appoint inferior officers under him, if such inferior officers commit a forfeiture, the superior officer shall take advantage thereof. Woodward v. Foxe, Ante, s. 80. Poph. 119. 2 Vern. 174.

107. A person may lose an office by the acceptance of another office, incompatible with that which he already holds. And all offices are incompatible and inconsistent where they interfere with each other, for that circumstance creates a presumption that they cannot be both executed with due impartiality. By acceptance of an incompatible office. 4 Bar. & Adol. 9.

108. Thus where a forester by patent for life, having been made justice in eyre of the same forest, *hac vice*, the forestership was held to become void; for these offices were incompatible, because the forester was under the correction of the justice in eyre, and he could not correct himself. 4 Inst. 310.

109. Upon a mandamus to restore a person to the office of town clerk, it was returned, that he was elected mayor, and sworn, therefore they chose another town clerk. The court was strongly of opinion that the offices were incompatible, because of the subordination. Verrior v. Mayor of Sandwich, Sid. 305. Milward v. Thatcher, 2 T. R. 81. and see 9 Barn. & Cress. 703.

By the destruction of the principal.

110. An incidental office may be lost by the destruction of the principal office, or the determination of the thing to which the office was annexed.

Howard's case, Cro. Car. 59.

111. King James, by his letters patent under the great seal, granted *officium custodis* of a park to Sir Charles Howard, *habendum* to him for life. All the justices and barons agreed, that the park being dissolved, the office was determined; for the office being only an accessary, must follow the fate of the principal. It was also said, that if a person grants the office of steward of a manor, with all profits of courts, &c. and the manor is afterwards destroyed, the office of steward, together with the casual profits annexed to it, is determined.

112. In the above case, an annual fee of 40*l.* had been given to the parker, issuing out of the king's manors in the county of Surrey; and a question arose, whether that was determined by destruction of the park. Walter, Ch. B. held that it was: but all the other justices and barons dissented from him, because the annual fee was granted by a distinct clause, and not out of the park; and although the office was determined, yet because it was not by the act or default of the grantee himself, but by the act of the grantor only, they conceived the grantee should enjoy the annuity.

Suspension.

113. [The King in the exercise of his prerogative may by letters patent suspend a public officer, though the office be granted for life. And after suspension the officer is entitled to receive the salary, but not to exercise the functions of the office.

3 Swan. 178. note from Lord Nottingham's MSS.

114. Slingsby, the master of the mint, in the 32 Car. 2. 1680, upon examinarion before the lords commissioners of the Treasury being found guilty of several misdemeanors, was ordered to be suspended from his place, and the patent of suspension coming to be sealed, he put in a *caveat* contending that he could not be removed without an inquisition finding a forfeiture or a *scire facias*; and that he could not be suspended, his salary arising by the profits, and he also having casual profits that arose by the exercise of his place, such as 18*d.* for every pound weight of silver that is coined, and 7*s.* for every pound of gold, besides other privileges. The Court took a distinction between what was properly Slingsby's office as master of the Mint, and that which was a collateral contract by indenture between him and the King. To his office strictly and properly, there belonged

nothing but a mere salary, which must and ought to be continued to him notwithstanding his suspension; but his service in that office the King was not obliged to use, unless he pleased; and, therefore he might discharge him in the exercise of it, paying him his salary; but the profits and perquisites arising from the contract with the King, he was not entitled to upon the determination of the contract. The patent was directed to be sealed accordingly.

115. Although as stated in a former section that the statute of 5 & 6 Edward 6 does not extend to commissions in the army, yet upon principles of public policy the courts have repeatedly decided that an assignment by an officer in the army or navy of his full or half pay is invalid. Neither if he becomes bankrupt will it pass to the assignees for the benefit of his creditors. Emoluments of this sort, as Lord Kenyon observes, being granted for the dignity of the state, and for the decent support of those persons who are engaged in its service: and that it might as well be contended that the salaries of the judges, which are granted to support the dignity of the state and the administration of justice, may be assigned. Neither can an officer in the army pledge or mortgage his commission.

Officer's half-pay not assignable. s. 91. 2 Anst. 533. 1 Hen. Bl. 627. 3 Bos. & Pul. 328.

Flarty v. Odlum, 3 T. R. 681; over-ruling. Stuart v. Tucker, 2 W. Bl. 1137. 1 Ball. & Bea. 389. Collyer v. Fallon, T. & Rus. 459.

116. But pay which is actually due, as well as pensions for past services may be aliened; but pensions for supporting the grantee in the performance of future duties are inalienable.

3 T. R. 683. 1 Swan. 79.

117. We conclude the present subject by adverting to the statute 45 Geo. 3. c. 72. s. 92. which prescribes a particular form of letter of attorney for receiving the prize money of petty officers, seamen, marines, and soldiers. The recent case of Wellard v. Moss has decided that a party acting as boatswain under an appointment by a commanding officer on a foreign station, under the provisions of 49 Geo. 3. c. 108. s. 16. was not a petty officer within the former act, and, therefore entitled to assign his prize money without regard to the restrictions thereby imposed. The statute 49 Geo. 3. authorizes commanding officers on foreign stations to appoint officers to vacancies, and the above case decides that the party acting under the above appointment was to be considered legally as a boatswain, who is above the rank of a petty officer.]

1 Bing. 134. and see Pill v. Taylor, 11 East, 414.

TITLE XXVI.

DIGNITIES.

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Origin and Nature of Dignities.

CHAP. II.

What Estate may be had in a Dignity, and its Incidents.

CHAP. III.

Descent of Dignities.

CHAP. I.

Origin and Nature of Dignities.

SECT. 1. *Feudal Dignities.*
5. *English Nobility.*
6. Curia Regis *and Parliament.*
15. Barones Majores et Minores.
17. *Necessity of a Writ of Summons.*
20. *Names of Dignities.*
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83. *By Letters Patent.*
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90. *On whom Dignities may be conferred.*
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SECTION I.

Feudal Dignities.

THE dignities or titles of honour which now exist in England derive their origin from the feudal institutions, and were first introduced here by the Normans. All the feudal writers agree that where a tract of land was granted by a sovereign prince to

one of his followers, to be held immediately of himself by military or other honourable services, with a jurisdiction, it was called a *feudum nobile*, and conferred nobility on the person to whom it was granted. Where a title of honour was annexed to a *feudum nobile*, it was called a *feudum dignitatis*. And all feudal sovereigns claimed and exercised the right of erecting a particular tract of land into a *feudum dignitatis*, by annexing to it a dignity or title of honour.

2. Thus it is said in the *Liber Feudorum—Qui a principe de ducatu aliquo investitus est, dux solito more vocatur. Qui vero de marchiâ, marchio dicitur. Qui vero de aliquo comitatu investitus est comes appellatur.* From which it appears that feudal dignities were those of duke, marquis, and earl; and were not mere personal distinctions, but annexed to lands.

3. In Normandy the dignities of earl and baron were well known at the time of the Conquest; and were strictly feudal, being annexed to lands. Thus we read in the *Grand Coustumier* of Normandy, c. 34. *Unde notandum est quod quædam sunt feuda capitalia, quædam subposita. Capitalia sunt quæ in capite tenentur, ut comitatus, baroniæ, et feuda loricæ.* And it appears from the 53d chapter of the same book, that the nobility of Normandy had a jurisdiction over their vassals. *Milites autem et libere tenentes qui habent comitatus vel baronias, vel dignitates alias feodales, vel feoda loricæ, vel francas sergenterias, vel alia franca feoda ac libera, habeant curias suas de suis residentibus, in simplicibus querelis, levibus et grossis mobilium et hæreditatum, et de latrocinio, licet per duellum habeant terminari.*

4. There was a species of fief noble in Normandy called an honour, to which a dignity was always annexed; and in Duchesne's Collection of Norman Historians there is a list of the great fiefs in Normandy, in which mention is made of several honours.

English Nobility.

5. Upon the establishment of the Normans in England, the Conqueror conferred the estates of such of the Saxon thanes, as had fallen in the battle of Hastings, on his principal followers as strict feuds; to be held immediately of himself, by fealty, homage, and military or other honourable services. These were *feuda nobilia*; the persons to whom they were given became by such grants English nobles; and when about the 20th year of William's reign, the tenure of all the lands in England was de-

Dissert. c. 2. s. 1.

clared to be feudal, those who held immediately of the Crown by military or other honourable services, constituted the nobility, or first class of persons in the kingdom.

Curia Regis and Parliament.

6. At this period the feudal law was fully established in all the kingdoms of Europe. William held the duchy of Normandy of the Crown of France as a strict feud; and the only ideas of government which he or his followers could entertain must have been purely feudal. Now it was an universal principle of that polity, that the lord should hold a court for the administration of justice, and the government of the seigniory, which was composed of himself and his vassals, who were bound by their tenure to attend, and assist him with their advice.

Craig. lib. 2. tit. 2. s. 10.

Madox, Exch. c. 1. s. 2.

7. In conformity with this principle we find that the first monarchs of the Norman line held a great court in their palaces at Christmas, Easter, and Whitsuntide; which was attended by all their immediate vassals, and was called *Curia Regis*. These were so regular, as to be called by the old historians *curia de more*, or *curia regis de more coadunata*, for which no summons was necessary: if the King wanted to consult his barons at any other time, he used to send them a summons to attend him on a particular day. These latter councils are called by Eadmerus *conventus principum ex præcepto Regis;* to distinguish them from the former regular meetings, at the three great festivals.

Robertson's History of Cha. V. Vol. I. 43. 8vo.

8. The power of feudal sovereigns over their vassals was extremely limited; they had no right to demand any services or duties but those which were expressly reserved upon the investiture of the feud; therefore as to all things extra-feudal, the particular consent of the vassals was necessary. Hence arose the practice of summoning them to the lord's court, to procure their consent to such new measures as the sovereign might wish to adopt; but particularly to obtain their concurrence in any new tax or imposition; which gave rise to those general assemblies that upon the continent were called states-general, and in England parliaments.

9. The *curia Regis* was therefore the original of our parliaments; though in process of time the general meetings of all the barons, when called together by a summons from the king, acquired the names of *magnum consilium* and *commune consilium regni;* and the appellation of *curia Regis* was only applied to that constant and permanent court which was held in the King's

palace for the administration of justice, and the management of the King's revenue.

10. The duty of attending the *curia Regis* conferred a species of dignity on those who were bound to it, by which they came to be considered as a distinct and superior class of persons. They were called peers from the word *pares*, which in the feudal law denoted persons holding of the same lord, under the same tenure, laws, and customs, and with equal powers; for in that system, the tenants of every lord who met together in his court, to determine the disputes arising within his seigniory, were called *pares curiæ.*

Craig, Lib. 2. tit. 2. s. 10. Spelm. Gloss. voce *Pares.*

11. In conformity with those feudal principles which have been stated in the preceding Sections, we find that during the reign of William I. and that of his sons, and even down to the end of the time of King Henry III., every person who held his lands immediately of the Crown, as an earldom or barony, or by the service of one or more knights, was a member of the *magnum consilium* or *parliament.*

12. Mr. Selden has produced such proofs of this fact, during the reigns of William Rufus and Henry I., as might be expected from the paucity of materials relating to that period. As to the reign of King Henry II. he says,—"To the parliament of Northampton also, or the *magnum consilium*, as Roger of Hoveden and others call it, held in October, 11th year of Henry II. or 1165, all that were tenants in chief were summoned. *Castro Northamptoniæ*, (saith an ancient writer of the life of Thomas Becket, archbishop of Canterbury, speaking of the King) *solenne statuens celebrare consilium, omnes qui de Rege tenebant in capite, mandari fecit.*"

Tit. of Hon. P. 2. c. 5. s. 20.

13. In the reign of King John, we have the unanswerable evidence of *Magna Charta* to this fact; for in that celebrated statute, there is an express stipulation to summon to the *commune consilium regni*, not only all the earls and barons, but also all the King's tenants *in capite. Omnes illos qui de nobis tenent in capite.*

c. 14.

14. The persons who held their lands immediately of the Conqueror are all enumerated in Domesday, and in the appendix to Doctor Brady's Introduction to the History of England: they do not exceed seven hundred, several of whom held in socage. These possessed all the lands in the kingdom, except what belonged to the church, and to the Crown.

1 Inst. 108.

Barones majores et minores.

15. In the reign of King John an alteration of great importance took place in the rights of the barons and tenants *in capite*; for only the principal barons, or *barones majores*, were summoned to attend parliament by particular writs from the King; and the rest, who acquired the appellation of *barones minores*, were called by one general summons, from the sheriffs of their respective counties.

This practice was recognized and legally established by the *Magna Charta* of King John, c. 14., by which it was declared, that parliament should in future be summoned in that manner. —*Et ad habendum commune consilium regni de auxilio assidendo aliter quam in tribus casibus prædictis, vel de scutagio assidendo, summoneri faciemus archiepiscopos, episcopos, abbates, comites, et majores barones, sigillatim per literas nostras, et præterea faciemus summoneri in generali per vice-comites nostros omnes illos qui de nobis tenent in capite, &c.*

Idem c. 5. s. 21.

16. Selden supposes that, in consequence of the quarrels between King John and the barons, several baronies had escheated to the Crown, either by attainder or otherwise; which were partly granted to others, and partly retained as rewards for those who should come over to the King. That several barons were also so decayed in their estates as not to be able to support their rank: and the ancient barons or *barones majores*, who retained their possessions, foreseeing that their dignity might be diminished, if the new tenants in chief, or grantees of the escheated baronies, and the decayed barons, should remain equal to them; procured a law in some of the parliaments preceding the Great Charter, by which they only in future should be styled barons; and the rest tenants in chief only, or knights: but because their ancient name could not be wholly taken from them, therefore the addition of *majores* was given to the ancient and more powerful barons, and that of *minores* to the others.

Necessity of a writ of summons.

17. From this period the right of sitting in parliament appears to have been confined to those persons who were possessed of entire baronies. But in the reign of King Henry III. a still greater alteration took place in the rights of the barons: for whereas every tenant *in capite* was, before that period, *ipso facto*, a parliamentary baron, and entitled to be summoned, either by the king's writ, or by the sheriff; yet about that time some new law is said to have been made, by which it was established that no person,

though possessed of a barony, should come to parliament, without being expressly summoned by the king's writ.

18. This fact was first mentioned by Camden, who cites an ancient writer, without naming him, as his authority. *Ille enim, (Hen. III.) ex satis antiquo scriptore loquor, post magnas perturbationes et enormes vexationes inter ipsum Regem, Simonem De Monteforti, et alios barones, motas et susceptas, statuit et ordinavit, quod omnes illi comites et barones regni Angliæ, quibus ipse Rex dignatus est brevia summonitionis dirigere, venirent ad parliamentum, et non alii; nisi forte dominus Rex alia, vel similia brevia, eis dirigere voluisset.* Britannia, Introd.

19. Selden appears to have given but little credit to this narration; and says he never could discover who this ancient writer, cited by Camden, was: but thought that not long after the Great Charter of King John, some law was made that induced the utter exclusion of all tenants in chief from parliament, beside the ancient and greater barons, and such others as the king should in like manner summon. Id. c. 5. s. 21.

20. With respect to the different orders, and names of dignities, the most ancient are those of baron and earl. Spelman says, the word *baro* was introduced here by the Normans. It was originally synonimous with *homo:* and a very learned French antiquary was of opinion, that all those persons to whom feuds were granted by kings and sovereign princes, were called *barones et homines Regis, sive qui hominium regi debent.* Selden says, that in the extracts out of the inquisitions taken in the time of King John, the phrases of *tenentes per baroniam et servitia militaria,* and *milites et barones tenentes in capite de Rege,* are used for the same persons. In another place he observes that *tenere de Rege in capite, habere possessiones sicut baroniam,* and to be a baron with a right to sit with the rest of the barons, in councils, or courts of judgment, according to the laws of that time, were synonimous. And Spelman says, *Ævo Henrici secundi quævis tenura in capite habebatur pro tenurâ per baroniam.* Names of dignities. Baluze Capit. V. 2. 692. Id. s. 17. Id. s. 20. Gloss. voce Baronia.

21. Lord Coke has observed, that in ancient records, the barons included the whole nobility of England; because regularly all noblemen were barons, though they had a higher dignity: and the great council of the nobility were all comprehended under the name of the council *De Baronage.* 2 Inst. 6.

22. In consequence of the practice of subinfeudation, the

Bract. 84 a. 2 Inst. 7.

shillings: but that of a baron was uncertain. It was afterwards declared by the *Magna Charta* of King John, c. 2 that the ancient relief of a baron, *de baroniâ integrâ*, was 100 marks.

Voce Honor.

35. A barony, was sometimes called an honour, as appears from the following passage in Spelman's Glossary.—*Honor ab Anglo Normannis dictum videtur uniuscujusque majoris baronis feodale patrimonium, seu baronia. Uti manerium plurimis gaudet (interdum feodis sed plerumque) tenementis consuetudinibus servitiis, &c. Ita honor plurima complectitur maneria, plurima feoda militaria, plurima regalia, &c. Dictus etiam hic olim est beneficium seu feudum regale, tentusque semper a Rege in capite.* The proprietors of these baronial estates, or land baronies, were all entitled to sit in parliament till the reign of Henry III., who made a law, which has been already stated, that no person should attend parliament without a writ of summons. And though it has been shewn that this law did not apply to the great barons, yet probably the Crown frequently availed itself thereof, by omitting to summon some of the lesser barons, or those who acquired estates held *per baroniam*; for some passages in our ancient records evince that after the reign of Hen. III. all tenants *per baroniam* were not peers of parliament.

36. It is stated in Matthew Paris, *anno* 1070, that soon after the Conquest, the lands of the bishops and great abbots, which had been held before in *frank-almoigne*, were declared to be baronies; by which the bishops and abbots were bound to attend the *Curia Regis*. It is, however, probable that they did not willingly acquiesce in this alteration; for when the immunities of the church were so much restrained at Clarendon, it was expressly enacted, that all ecclesiastics who held their lands of the King, should thereafter hold *per baroniam*, and attend the *curia Regis*. *Archiepiscopi, episcopi, et universæ personæ qui de Rege tenent in capite, habeant possessiones suas de Rege sicut baroniam: et inde respondeant justiciariis et ministris Regis; et sequantur et faciant omnes consuetudines regias; et sicut cæteri barones, debent interesse judiciis curiæ Regis cum baronibus; quousque perveniatur ad diminutionem membrorum, vel ad mortem.*

Seld. Id. s. 20.

Spelm. Concil. 1 Inst. 70 b. n. 297 a. 4 Inst. 45.

4 Inst. 44. Collins, 111.

37. Lord Coke observes, that unless an ecclesiastical person held *per baroniam*, the King had no right to summon him to parliament; consequently he was not bound to obey such sum-

mons: because *quoad secularia*, he is *mortuus in lege*, therefore not capable to have voice in parliament, unless he held *per baroniam*. And though such a prelate regular had been often called by writ, and had, *de facto*, had voice and place in parliament, yet if *in rei veritate* he held not *per baroniam*, he ought to be discharged of that service, and to sit in parliament no more.

38. The abbot of St. James, near Northampton, was summoned to parliament by King Edward II.: but, upon shewing that he did not hold of the Crown *per baroniam*, he was excused. In the next reign, the abbot of Leicester obtained letters patent, reciting that he did not hold any lands *per baroniam, per quod ad parliamenta seu consilia nostra venire teneatur*, and declaring that he and his successors should be for ever exonerated from coming to parliament. From which it may be inferred, that the particular service due for a tenure *per baroniam* was attendance on parliament when summoned. Seld. Id. s. 24. 4 Inst. 94.

39. The dignity of earl was originally annexed to the possession, either of an entire county, with *jura regalia;* in which case the county became palatine, and the earl thereof had royal jurisdiction, both civil and criminal, and royal seigniory; as in the case of the earldom of Chester: or where the King created a person earl of a county with the third part of the profits of the pleas of such county court; or where the King granted a considerable tract of land to a person, to hold *per servitium unius comitatus:* in all which cases the earldom was held by tenure. 4 Inst. 204.

40. An earldom, like a barony, was a feudal lordship, consisting of demesnes and services, held of the Crown *in capite*, with a civil and criminal jurisdiction; and it is declared by *Magna Charta*, c. 2. that the ancient relief of an earl, *de comitatu integro*, was a hundred pounds. Seld. Id. s. 10.

41. The possessions of an earl were frequently called honours, as well as those of barons. When they came into the hands of the King by forfeiture or escheat, they were distinguished from the ancient possessions of the Crown, by the name of *honores comitum*. So where a new earl was created of such a forfeited or escheated earldom, the possessions were usually granted to him by the name of *honor comitatus;* and in the charters of creation of earls, a clause was frequently inserted, enabling them Mad. Exch. c. 10. s. 4. 2 Inst. 8. Seld. Id. s. 10.

to hold all, or a part of their estates, and also their future acquisitions, *sub comitati honore;* by which those lands became parcel of their earldoms.

42. The dignity of duke was also originally annexed to the possession of lands; for when King Edw. I. created the Black Prince Duke of Cornwall, he gave him a charter, by which he granted to him the name and honour of Duke of Cornwall, the office of sheriff of Cornwall, together with several manors and franchises in Cornwall, and in other places, which are erected into a duchy.

Seld. Id. s. 28.

43. Dignities by tenure are saved by the stat. 12 Ch. 2. c. 24. s. 11. whereby it is declared, that nothing in that act "shall infringe or hurt any title of honour, feudal or other, by which any person had or might have a right to sit in the Lords House of Parliament, as to his or their title of honour, or sitting in parliament, and the privileges belonging to them as peers.

Have sometimes gone with castles, manors, &c.

44. Dignities appear in some cases to have been expressly annexed to the possession of particular castles, manors, &c., and to have followed the descent of those castles and manors, &c. and to have gone to an heir male, when entitled to those castles, manors, &c. under an entail, in preference to the heir general.

45. [It would appear from a recital in a patent under the great seal granted in the 22 Hen. 6. to John Talbot, son of the Earl of Shrewsbury, who had married the heiress of the family of L'Isle, that the possessors of the manor of Kingston in Berkshire, had been by reason of such possession Barons or Lords of L'Isle, and by that name had place and seat in parliament from time immemorial. The charter professes to confirm that right to John Talbot (he being then in possession of the manor) and to his heirs and assigns for ever, being lords of the said manor; by which, Lord Coke says, he had a fee simple qualified in the dignity determinable by the alienation of the manor.

A similar recital occurs in another patent 15 Edw. 4. which grants to Sir Edward Grey, the title and dignity of Baron L'Isle to hold to him and his heirs, by his wife Elizabeth, in right of whom he was seised of the said manor, and who was the granddaughter and eldest coheir of John Talbot, first Viscount L'Isle.

But the recitals in these charters are proved to be false by the evidence adduced before the committee of privileges on the petition of Sir John Shelley Sidney, claiming as eldest coheir of

the ancient Barony of L'Isle. The evidence alluded to proved that the manor of Kingston L'Isle was in the first year of the reign of Edw. III., after the death of Warine De L'Isle the grandfather of Warine, Lord De L'Isle, held of Robert De Insula by knight service and not of the crown in capite, which is essential to a barony by tenure. So also by an inquisition of the 34 Edw. 3. after the death of Gerard De L'Isle, and in the 6 Rich. 2. on the death of Warine Lord De L'Isle, it appeared that at both those periods the manor of Kingston L'Isle was held of Robert De Insula by Knight service and not of the Crown in capite.]

46. Upon the death of Thomas Lord Berkeley (*a*) in 5 Hen. 5. it was found by inquisition, that the castle and manor of Berkeley were entailed by the grand-father of the deceased, by a fine levied in 23 Edw. 3., on himself and the heirs male of his body; and as the deceased left only a daughter, they descended on James de Berkeley, as cousin and next heir male to the deceased. Dugdale observes, that this James, by virtue of the said entail, enjoyed the castle and barony of Berkeley; and was summoned to parliament in 9 Hen V. and to all the parliaments that were held in the time of King Henry VI. Dugd. Bar. Vol. I. 361.

47. William Lord Berkeley having no children, by an indenture in 3 Hen. 7. covenanted to assure the castle and manor of Berkeley, for want of issue of his own body, unto King Henry 7. and the heirs male of his body, and for default of such issue, to his own right heirs; and settled the same accordingly. In consideration of this, he obtained the office of earl marshal, and the dignity of a marquis, to himself and the heirs male of his body. This William Lord and Marquis of Berkeley dying without issue, and the castle and manor of Berkeley having thereby vested in the Crown, Maurice de Berkeley, the brother and heir of William, never had or enjoyed the barony of Berkeley: but having recovered several other estates belonging to the family, he died in 22 Hen. 7. leaving issue Maurice his eldest son, who was summoned to parliament in 14 Hen. 8. But he Id. 363.

(*a*) [The case of the Barony of Berkeley, is fully stated in the Appendix to Mr. Nicholas's Report of the L'Isle Peerage Case, p. 318. 361. a claim by William Fitzarding Berkeley, of Berkeley Castle, to the title of Baron Berkeley, as a baron by tenure, was recently discussed before the Committee of Privileges in the House of Lords. He has since been created Baron Segrave.]

had not the place of his ancestors, in regard that the castle of Berkeley, and those lordships belonging thereto, which originally were the body of that ancient barony then remained in the Crown by virtue of the entail: he therefore sat in parliament, merely as a new baron, in the lowest place, of which, says Dugdale, he had no joy, considering the eminency of his ancestors, and the precedence which they ever had; though in point of prudence he was necessitated to submit, being thereunto persuaded by his counsel. Upon the death, however, of King Edw. 6., who was the last heir male of King Henry 7., the reversion of Berkeley castle, and the other estates given to that King, fell into the possession of Henry de Berkeley, as right heir of William Lord and Marquis of Berkeley; in consequence of which he was summoned to parliament in 4 Phil. and Mary, and was seated in the place of the ancient barons of Berkeley.

Journ. Vol. I. 516.

Rot. Parl. Vol. IV. 441. Dugd. Bar. Vol. I. 322. See Nicholas's L'Isle Peerage case, Appd. 361. 379. 1 Lords' Rep. 426, &c.

48. It appears from the Rolls of Parliament, 11 and 12 Hen. 6. that John Lord Maltravers claimed to have place in parliament as Earl of Arundel; considering that his ancestors earls of Arundel, as lords of the castle, honour, and lordship of Arundel, had their place in parliament, time out of mind, by reason of the said castle, honour, and lordship, to which the said name and title of an earl had been annexed;(*a*) and shewed that he was then seised of the said castle, honour, and lordship. The Duke of Norfolk, who was then a minor, presented a petition, shewing that the said castle and dignity belonged to him by inheritance. The counsel of Lord Maltravers exhibited his title to the castle of Arundel, under a special entail. And after mature deliberation it was resolved, that Lord Maltravers was entitled to sit in parliament as Earl of Arundel, and in the ancient place of those earls.

Rot. Parl. Vol. V. 148.

Dugd. Bar. Vol. 1. 323.

49. It also appears from the Rolls of Parliament, 27 Hen. 6., that in consequence of a dispute between the earls of Arundel and Devon, respecting their precedence, the judges declared that the Earl of Arundel was seised of the castle, honour, and lordship of Arundel, whereto, the name, estate, and dignity of Earl of Arundel was, and time out of mind had been united and annexed; and by that reason he bore and had that name,

(*a*) [The accuracy of this allegation is questioned in the first Report of the Lords Committees on the dignity of a Peer, 432, et seq.]

and not by way of creation. Whereupon it was determined that the said Earl of Arundel should retain his pre-eminence, by reason of the said castle, honour, and lordship of Arundel, as worshipfully as any of his ancestors earls of Arundel, above the said Earl of Devon and his heirs.

50. The castle and honour of Arundel descended to Henry Fitzallan, who settled the same on his grandson, Philip Howard, the eldest son of Thomas Duke of Norfolk, who was attainted of high treason, and beheaded in 1572. This Philip Howard, by reason of the possession of the castle and honour of Arundel, was summoned to parliament as Earl of Arundel in 23 Eliz., and appears by the Journals to have sat in the place of the ancient earls of Arundel.

Vincent on Brook, 560.

51. Sir Thomas Fane, having married Mary the only daughter and heir of Henry Lord Abergavenny, claimed that barony in 1634, and shewed that King Richard II. caused a writ of summons to be directed to Sir William Beauchamp, to attend his parliament at York, where he appeared and sat as a baron. That the said dignity descended to Edward Nevill, the father of the said Mary; who, therefore, as his heir general, became entitled to the dignity.

Barony of Abergavenny, Collins, 61. See Nicholas's Rep. of the L'Isle Peerage Case, Appd. 387. et seq. Third Rep. of the Lords Com. on the Dignity of a Peer, p. 216

Edward Nevill, who was the nephew and heir male of the last Lord Abergavenny, claimed the dignity under the will of George Lord Bergavenny, made in 27 Hen. 8.; by which he entailed the barony of Abergavenny, with all other his castles, lordships, honours, &c. on himself and the heirs male of his body, remainder to Sir Edward Nevill and the heirs male of his body; and deduced his pedigree as heir male of the body of Sir Edward Nevill, to whom the estates so entailed had descended, by the failure of heirs male of George.

The case was referred to, and argued in the House of Peers for seven days. Serjeant Dodderidge, who was counsel for Sir Edward Nevill, stated the question to be, whether the barony of Abergavenny, with the title and dignity, was descended unto the lady, being the daughter and heir of the last baron of Abergavenny; or unto the special heir male, to whom the castle of Abergavenny, being anciently the head of the barony, was descended. Wherein two things were to be considered—First, whether within the realm of England there were any baronies by tenure; and whether *baronia sit dignitas annexa feudo;* viz.

Whether the heir male, having the castle holden *per baroniam*, should have the title; or the heir general, who had not the castle?

Secondly, Whether by former precedents it might be shewn that this barony had been guided by the lawful descent of the castle of Abergavenny; or whether the same had gone to the heirs general, sundered from the castle?

Those who denied the existence of baronies by tenure objected—First, that if there were any, then the grantee of them must hold by the same tenure as the feoffor; but that was *per baroniam*; and therefore if such grant were made to persons ignoble, they then would be noble, which was absurd.

Secondly, It was evident that many manors, which in former times were holden *per baroniam*, were then in the possession of mean persons, who never claimed the title of baron.

Thirdly, That there were some ancient barons, who had sold their castles, and yet retained their dignities.

To these objections the serjeant answered, first, that if a baron by tenure aliened without licence, he forfeited his estate, which was seized by the King; and so the dignity was extinguished. If he aliened with licence, such alienation was made, either for the continuance of the dignity in his blood, by entailing it to some branch of his family, or to a stranger. In the first case he mentioned several instances where the dignity was allowed to pass; and be enjoyed by the alienee, particularly those of the earldoms of Warwick and Arundel, and the barony of Berkeley. In the second case he mentioned several instances where the alienee had borne the name and had the dignity of a baron, in respect of such barony so aliened; and where such alienee had no dignity before, he had, in respect of that, been summoned to parliament, and enjoyed the dignity.

Vide Collins, 113.
Ante.

Infra, c. 2.

To the second objection he answered, It was true that ancient baronies were then in the hands of men ignoble: but the reasons were two-fold, 1. Because they had been aliened by licence to them. 2. Because such manors had come to the Crown by way of reversion, escheat, or forfeiture, and were granted again, reserving other services.

As to the third objection, that ancient barons had aliened their castles, and still retained their dignities, he answered, that such baronies were created by writ, in which the persons sum-

moned were named by the principal places of their abode; therefore, though they had aliened their castles or manors, from which they were named, yet they retained their dignities.

The serjeant then proceeded to shew that the castle and manor of Abergavenny were originally granted to be holden *per baroniam, sive* grand serjeanty: that the barony was a very large seignory, and had petty barons holding thereof; and that the title and dignity had *de facto* gone with the castle.

It is said in the Journals,—"That the question seemed nevertheless not so perfectly and exactly resolved, as might give clear and undoubted satisfaction to all the consciences or judgments of all the Lords, for the precise point of right; and yet so much was shewn and alleged on each part, as in the opinion of the House (if it might stand with the King's good pleasure and grace,) made them both capable and worthy of honour. It was, therefore, moved, and so agreed, that information should be given unto the King's Majesty of all the proceedings of the said court in this matter; and that humble suit should be made to his Majesty from the lords for the ennobling of both parties, by way of restitution; the one to the said barony of Bergavenny, and the ancient place belonging to the same; and the other to the barony of Le Despencer." Vol. 2. 345.

King James agreed to the proposal of the House: but nevertheless required the Lords to proceed to determine upon which of the said candidates the dignity of the barony of Bergavenny should in their judgment be settled. The question was proposed by the Lord Chancellor, whether the heir male should have the dignity of Bergavenny; and it was resolved, by the greater number of voices, for the heir male; that Nevill should be restored to the barony of Bergavenny, and settled therein. A writ of summons was in consequence issued to Edward Nevill, and he took his seat in the House as Baron Bergavenny.

52. [An ineffectual attempt has been made to prove that the barony of Roos, or Ross, of Hameslake, Trusbutt, and Belvoir, was a barony by tenure.] A claim was made by Lady Henry Fitzgerald, in 1805, to a coheirship in the barony of Roos, as a barony originally created by a writ of summons in 49 Hen. 3. directed *Roberto de Ros;* from whom it descended, through a female heir, to the family of Manners, afterwards created earls and dukes of Rutland. Lady Henry Fitzgerald claimed to be

Barony of Roos. See this case stated in the first Report of the Com. of the Lords, on the Dignity of a Peer, 444. &c. Also App. Nich. I'Isle Peerage Case, p. 391. et seq.

one of the coheirs of Lady Frances Manners, who was one of the two daughters and coheirs of John the fourth earl of Rutland. The claim was opposed by the duke of Rutland: who stated that Robert de Ross was seised of the manors of Hameslake, Trusbutt, and Belvoir, each of which was held of the Crown *in capite per baronam*, and also of the manor of Ros or Ross, in Holdernesse, which was not a barony at the time when the writ of summons was issued to him; and therefore the writ did not operate as a creation of a new barony, but as a recognition of an ancient baron, in right of those baronies which he then held; and as the honour and castle of Belvoir, which was one of those baronies, continued from that time in the duke's family, and was then in his possession, by descent, the barony of Roos was annexed to that honour and castle.

The Attorney-General (Sir A. Piggott) observed, that the duke of Rutland's counsel had stated an argument to this effect: that the writ which was addressed in 49 Hen. 3. to Robert de Ros, created a barony by tenure: if at the time when the writ issued, it could be shewn that Robert de Ros had any barony in him. That this argument would make every writ create a barony by tenure, if it could be shewn that at the time when the writ issued the person to whom it was addressed had any barony in him; without a reference to any word in the writ which connected the person with the tenure. That the committee of Privileges was to take the writ, in which there was no reference to any castle or barony, and to enquire, *dehors* the writ, whether the person had any barony; and if he had, then to turn that, contrary to the universal construction that had prevailed, into a territorial dignity. (*a*)

The claim was rejected.

Dignities by Charter.

53. It has been stated, that all dignities by tenúre were created by charter, containing a grant of the lands to which the dignity was annexed. Dignities, as personal honours, have also been created in early times by royal charter, of which Selden has published several.

Id. s. 10.

Vol. 2. 273.

54. We find in the rolls of parliament, that in 36 Edw. 3. the

(*a*) [The arguments in support of the proposition that the dignity of a peerage cannot now be considered as by law incidental to the tenure of any description of land, are forcibly urged in the First Report of the Lords on the Dignity of a Peer, 397, and Nich. L'Isle Peerage Case, 405 to 406.]

chancellor declared to the parliament the King's intention to honour such of his sons as were of full age. That his son Lionel, who was then in Ireland, should be Duke of Clarence; his son John, Duke of Lancaster; and his son Edmund, Earl of Cambridge. After which the King did gird his son John with a sword, and set on his head a cap of fur, and upon the same a circlet of pearls and gold, and named him Duke of Lancaster; and thereof gave him a charter. In like manner the King girded his son Edmund with a sword; and named him Earl of Cambridge, and thereof gave him a charter.

55. In the rolls of parliament, 9 Rich. 2. there is an account of the confirmation of a charter, by which that prince had granted to his uncle, Edmund Earl of Cambridge, the dignity of Duke of York. The charter is recited, of which the operative words are:—*In ducem erexímus, eidem ducatus Eborum titulum assignantes, et nomen.* And the King, with the consent of parliament, confirmed it, and invested him with the dignity, by delivery of the charter; girding him with a sword, and putting on his head a cap of honour, and a circlet of gold, or coronet. Vol. 3. 205.

56. In the time of King Richard II. it became a practice to create dignities by letters patent under the great seal; the first instance of which is said to have been in the eleventh year of that prince's reign; when John Beauchamp de Holt was created Lord Beauchamp by letters patent. "Before whom (says Lord Coke) there was never any baron created by letters patent, but by writ." Therefore, whenever a barony appears to have existed before the 11 Rich. 2. it must be taken to be either a barony by tenure or by writ. By letters patent. 1 Inst. 16 b. Seld. Id. s. 28.

57. It appears to have been always the practice, whenever our monarchs were desirous of convening a *magnum* or *commune concilium*, to call for the attendance of their nobility by writs of summons, addressed to each of them. In consequence of an article in *Magna Charta*, particular writs were only sent to the *barones majores*. But after the law mentioned by Camden, that none but the great barons, and such others as were summoned by the King's writ, should come to parliament, the Crown assumed the prerogative of sending writs of summons to persons who were not possessed of baronies, by virtue of which they were seated among the peers, and acquired the dignity of barons. Dignities by writ. Ante, s. 15.

Dugd. Sum. Preface, Collins, 118.

58. This mode of creating dignities is supposed to have been first adopted by King Henry III.; for, in consequence of the barons' wars, a great number of the ancient nobility were destroyed; therefore, when a parliament was summoned after the death of Montfort, writs of summons were sent to several persons not possessed of land baronies, who thereby became barons.

Id. s. 22.

59. Selden observes, that in consequence of this practice, barons became divided into two sorts: barons by writ and tenure, and barons by writ only. Barons by writ and tenure were such as, having the possession of ancient baronies, were called by several writs to parliament, according to that clause in *Magna Charta* which relates to the *barones majores*. Barons by writ only, were such as were called by the like writ of summons, though they had not land baronies: or where barons by tenure had aliened their possessions, retaining their ancient place and dignity, they became by such alienation barons by writ only.

Ante.

A dignity by writ is, therefore, where the Crown issues a writ of summons to a person who is not a peer, or tenant *per baroniam*, requiring him to come and attend parliament, there to consult with the peers of the realm on certain public matters.

The person summoned must sit.

60. A writ of summons has not the effect of conferring a dignity on the person summoned, till he has actually taken his seat in parliament. So that where a person was summoned to parliament by writ, and died before the parliament met; it was resolved that he was not a peer.

Lord Abergavenny's case, 12 Rep. 70. 1 Inst. 16 b.

61. A question arose in the parliament holden in 8 James I, whether Edward Neville, who was called by writ to parliament in 2 & 3 Mary, and died before the parliament met, was a baron or not. And it was resolved by the Lord Chancellor, the two Chief Justices, the Chief Baron, and divers other justices there present,—"That the direction and delivery of the writ did not make him a baron or noble, until he came to parliament, and there sat according to the commandment of the writ; for until that the writ did not take its effect. And in 35 Hen. 6. 46. he is called a peer of parliament, which he cannot be until he sits in parliament; and he cannot be of the parliament until the parliament begin: and forasmuch as he hath been made a peer

of parliament by writ, (by which implicitly he is a baron) the writ hath not its operation and effect until he sit in parliament, there to consult with the King, and the other nobles of the realm; which command, by his *supersedeas*, may be countermanded; or the said Edward Nevill might have excused himself to the King; or he might have waived it, and submitted to his fine: as one who is distrained to be a knight, or one learned in the law is called to be a serjeant; the writ cannot make him a knight or a serjeant. And when one is called by writ to parliament, the order is, that he be apparelled in his parliament robes; and his writ is openly read in the Upper House, and he is brought into his place by two lords of parliament, and then he is adjudged, in law, *inter pares regni.*" (*a*)

See Appendix to Nich. L'Isle Peerage Case, 297, &c.

62. The proof of a sitting in parliament, by virtue of a writ of summons, must be by the records of parliament: for Lord Coke says, if issue be joined in any action, whether a person be a baron, &c. or not, it shall not be tried by a jury, but by the records of parliament. 1 Inst. 16 b.

63. The ancient records or rolls of parliament seldom contain proof of the sitting in parliament of any lord. No lists of the peers who attended are to be found in them, nor are the names of any of the peers who were present mentioned, except where they are appointed triers of petitions, or appear to have acted in some particular situation.

64. The printed Journals of the Lords (*b*) contain lists of all the peers who attended; and though not, in strictness, records, they have been admitted by the House, in all modern cases, as sufficient evidence of a sitting.

65. [The want of such evidence of sitting in parliament, seems to have been one of the principal reasons for the rejection by

(*a*) There is an instance of a person's taking his seat by proxy. Vide Camden's Ann. *anno* 1597. *Note by Mr. Cruise.*

(*b*) [The Journals of the Lords commence in the first year of the reign of Hen. VIII. but those from the seventh to the twenty-fifth years of that reign, both inclusive, have been lost. Mr. Nicholas, in his valuable Appendix to the L'Isle Peerage Case, (No. VI. page 417,) has supplied original notes of proceedings in the House of Lords, in the third and twenty-seventh years of that reign, from MSS. in the British Museum. Previously to the accession of Hen. 8. the rolls of parliament are the only parliamentary records, but, as noticed in the text, these contain no regular lists of the peers who took their seats, so that a proof of sitting before the first of Henry VIII. depends on mere accident.]

the House of Lords of the petition of Sir John Shelley Sidney, claiming the ancient dignity of Baron L'Isle, as heir of the body of the eldest coheir of Elizabeth Countess of Warwick, on whose death (about 1421) the barony became, and has since continued, in abeyance. The barony in question was created in the 31st of Edw. III. when Gerard de L'Isle, was summoned to parliament by writ: he died in the 34th of the same king, leaving Warine de L'Isle, his son and next heir, who was summoned fourteen times to parliament between the 43rd Edw. III. and the 6th Rich. II. (1382) when he died—eleven of these parliaments, to which Warine de L'Isle was summoned, met, but there was no positive evidence on the rolls, that he was present at any of them; though there appears strong ground to presume that he actually sat in parliament. Warine de L'Isle left an only child Margaret wife of Thomas Baron de Berkeley, who left also an only child, the above-mentioned Elizabeth, wife of Richard Beauchamp Earl of Warwick.]

Are hereditary.

66. Although writs of summons to parliament, whether addressed to persons never summoned before, or to ancient barons, for in both cases the writs have in general been exactly similar, do not contain any words of limitation, except in one instance, which will be mentioned hereafter; yet it appears to have been long settled, that where a person has been summoned to parliament by the usual writ, and takes his seat in the House of Lords by virtue of such writ, he acquires the dignity of a baron, not only for himself, but also for all his lineal descendants, both male and female.

1 Inst. 9 b. 16 b.

67. Lord Coke was clearly of this opinion, having laid it down as fully settled in his time, that where a person was summoned to parliament by writ, and took his seat under such writ, his blood was ennobled to him and his heirs lineal.

68. This doctrine has, however, been controverted by Mr. Prynne, in his Plea for the Lords, and in his Register of Parliamentary Writs; by Mr. Elsynge, in his Manner of holding Parliaments; and by Mr. West, in his Inquiry into the Manner of creating Peers. The substance of their arguments may be thus reduced.

69. 1st, They observe, that in the writs of summons to parliament, neither the words baron, barony, nor heirs, are to be found. And as the king cannot, by his letters patent, create

any man a baron or peer, in fee or in tail, without express words of creation and limitation in the patent, for that purpose; and as in all the patents that passed from the 29 Hen. 8., there was not only a special clause inserted for creating the patentees barons, but also for enabling them and their heirs, or the heirs of their bodies to hold and possess a seat and place in parliament; it seemed equally necessary, that special words of limitation should be inserted in writs of summons, to persons who were not at the time peers of parliament; such as was practised in the case of Henry Bomflete, who being summoned to parliament in 27 Hen. 6., this clause was inserted in his writ,—*Volumus enim vos et hæredes vestros masculos de corpore* 1 Inst. 9 b. *vestro legitimè exeuntes barones de Vescy existere.*

70. 2d, It was a known rule of law, that the King's grants could not enure to two intents, especially when one of them was clearly expressed, and the other not. Now if a writ of summons did create any person a baron or peer, it operated by way of grant; which must be by the implication of an intent, not only not expressed, but perfectly foreign to that which was, and therefore at least in every thing but a writ of summons, could be, in law only intended: for the intention of the King, clearly expressed in the writ, was not to create the person summoned a baron, but only to consult and treat with him concerning the affairs of the nation; which certainly might be done without his being a baron.

71. 3d, If a writ of summons alone ennobled the person to whom it was addressed, and his descendants, then were all the Judges, the King's Serjeants at law, the masters in Chancery, and several other persons ennobled; for they received writs of summons, nearly similar at one time, and exactly similar at another, to those that were issued to the earls and barons, and attended parliament in pursuance of those writs; yet they never claimed to be peers.

72. 4th, It appeared, from the lists of the ancient writs of summons, that during the reigns of the three Edwards, some persons received writs of summons only once, some twice, and some during their lives; but none were sent to their descendants.

73. It would perhaps be impossible to give a satisfactory answer to the arguments above stated, nor has it hitherto been

attempted. It must, therefore, be admitted, that something more than a writ of summons and a sitting was formerly necessary to create an hereditary dignity.

74. Mr. Elsynge was of opinion, that investiture of robes was necessary to ennoble a person summoned by writ. And this idea is strongly confirmed by the resolution of the judges in Lord Abergavenny's case.—"And when one is called by writ of parliament, the order is, that he be apparelled in his parliament robes; and his writ is openly read in the Upper House, and he is brought into his place by two lords of parliament; and then he is adjudged, in law, *inter pares regni*." Ante.

75. An ancient manuscript in the Harleian Collection, No. 5127, intituled "Of Honorary Titles in England," contains the following account of the creation of a baron by writ. "The way of making a baron by writ is after this manner. First, he is brought by garter king at arms, in his surcoat, to the Lord Chancellor, between two of the youngest barons, who bear the robe of a baron. Then he shews his writ of prescript, which the Chancellor reads; then congratulates him as a baron, and invests him with those robes; and sends him back to his place. Then is the writ delivered to the clerk of parliament; and he, by garter shewed to the barons, is placed in the House of Peers; and from thence is the title of a baron allowed him as hereditary."

76. It must be supposed that this writ of prescript, as it is called, was not the usual writ of summons, but an additional warrant from the Crown, addressed to the Lord Chancellor, commanding him to invest the person summoned with the robes of a baron; for otherwise every person summoned by writ would have been equally entitled to investiture with robes, whereas it is quite certain this could not have been so, for the descendants of a great many persons who had been summoned by the usual writ, and had sat in parliament, were never summoned.

77. If the preceding authorities be admitted, it will follow that formerly a barony by writ was a personal dignity, unconnected with any particular castle, manor, or estate in land; which was created by a writ of summons, and a solemn investiture with robes, of the person so summoned, in full parliament.

78. [Another of the grounds which seems to have influenced the Lords, in the L'Isle Peerage, case to reject the petition of Sir

John Shelley Sydney, was the doubt whether previously to, and at the time of the death of, Warine de L'Isle, 6 Rich. 2. it was then understood to be law that the issuing of a writ to a man to come to the parliament, and a sitting consequent thereon, did confer on the person so sitting a right to an hereditary dignity, descendible to his issue.—(Case 258. 273. 280.)]

79. It is not known at what time the practice of investiture with robes ceased; but it appears to have been fully settled, when Lord Coke wrote, that a writ of summons to parliament, and a sitting in pursuance thereof, as a peer, except in the case of a spiritual person, operated as a creation of a barony, descendible to the lineal heirs, or heirs of the body, both male and female of the person so summoned; and this doctrine has been confirmed by so many decisions, that it is not now to be shaken. 1 Inst. 9 b. 16 b. Infra, c. 3.

80. It has been a very ancient practice to call up the eldest sons of earls to the House of Lords by writ of summons, by the name or title of a barony vested in their fathers. In all which cases they have been allowed to take their place in parliament, according to the antiquity of the barony, by the name of which they were summoned. Writs to the eldest sons of peers.

81. Dugdale, at the end of his Summons to Parliament, has given a list of those eldest sons of peers who had been summoned in this manner. The first of these was Thomas Arundel, Lord Maltravers, eldest son to Richard Fitzallan, Earl of Arundel, in 22 Edw. 4. In 16 Cha. I., Henry Howard, eldest son of the Duke of Norfolk, was called up to the House of Lords, by writ of summons by the title of Lord Mowbray, which was the most ancient title of the Norfolk family, and was placed first upon the barons' bench.

82. This practice has been adopted in all other similar cases; and it has been determined, that a writ of summons of this kind creates a dignity, which is hereditary in the blood of the person so summoned. Infra, c. 3.

83. In all letters patent, by which a dignity is created, there is a clause of investiture, similar to that contained in the ancient charters. And Dugdale says, the solemn investiture of barons, created by letters patent, was performed by the King himself, by putting on the new baron a robe of scarlet, and a hood furred with minever. This form continued till the 13 Dignities by letters patent. Bar. Vol. II. 195. Collins 122. Append. No. 5.

James 1., when the lawyers declared that the delivery of the letters patent was sufficient, without any ceremony.

84. In the case of letters patent, the creation of the dignity is perfect and complete, as soon as the great seal is put to the patent. Therefore, although the grantee should die before he takes his seat, yet the dignity will descend to his posterity.

2 Rep. 71.

Journ. Vol. XXI. 682.

85. Henry Waldegrave being created Baron Waldegrave by letters patent, 1 James 2., to him and the heirs male of his body, but dying before he sat in parliament, his eldest son was introduced in his robes, and took his seat. The late Lord Walsingham took his seat under the same circumstances.

1 Inst. 16 b. 12 Rep. 71.

86. It is laid down by Lord Coke, that where a person is created a peer by letters patent, the state of inheritance must be limited by apt and proper words, or else the grant is void. The usual limitation is to the heirs male of the body of the first grantee. In some it is confined to heirs male by a particular person; and in some the dignity is limited, in default of heirs male, to the eldest heir female.

Vide infra, c. 3.

Vide infra. c. 3. s. 76.

87. [In the letters patent, 1st of Mary, creating Sir Edward Courtenay, (son and heir of Henry Marquis of Exeter, who was attainted and beheaded, 30 Hen. 8.) earl of Devon, the limitation of the dignity is to the said Edward and his *heirs male for ever*. The said earl Edward died without issue. William third Viscount Courtenay, of Powderham castle, county of Devon, recently presented a petition to his Majesty, praying that his right to the earldom of Devon might be recognized. This petition, with the Attorney General's report thereon, was referred to the committee of privileges. By the evidence produced before the committee, the claimant proved himself to be heir male to the said Edward, the last earl in the collateral line, the said Viscount being the heir male of the body of Sir Philip Courtenay, knight, who was youngest son of Hugh first Earl of Devon; while the said Edward, the last earl, who died without issue, was heir male of the body of Hugh the second earl, and eldest son of Hugh, the first earl and common ancestor. The House of Lords resolved that the petitioner had made out his claim.]

Barony of Say and Sele, printed case, 1781.

88. A dignity originally created by writ may be revived or restored by letters patent; and in such a case the letters patent have been called letters of restitution.

89. Where a man possessed of a dignity marries, his wife becomes entitled to the same during her life, unless she afterwards marries a commoner, in which case she loses the dignity: but if a woman be noble by birth, whosoever she marries, she remains noble; for birthright is *character indelibilis.*

By marriage. Lords' Journ. Vol. XV. 241. 1 Inst. 16 b. 6 Rep. 53 b.

90. The Crown being the fountain of honour, may confer dignities on any person whatever, no qualification being requisite for that purpose. "Their number (says Sir W. Blackstone,) is indefinite, and may be increased at will by the power of the Crown; and once, in the reign of Queen Anne, there was an instance of creating no less than twelve together."

On whom dignities may be conferred. 1 Comm. 517.

91. It was formerly held by the House of Lords, that a person who was a peer of Scotland could not be created an English peer: but this is now altered.

Dukedom of Brandon, Dom. Proc. 1782

92. It seems doubtful whether a person can refuse or waive a dignity. Lord Coke says, "If the King calleth any knight or esquire to be a lord of parliament, he cannot refuse to serve the King there, *in illo communi consilio,* for the good of his country." And in Lord Abergavenny's case, the judges appear to have been of that opinion.

Whether they can be refused. 4 Inst. 44.

Ante.

93. This doctrine is contradicted by Lord Chancellor Cowper, who held that the King could not create a subject a peer of the realm against his will; because it would be then in the power of the King to ruin a subject, whose estate and circumstances might not be sufficient for the honour. He also held, that a minor might, when of age, waive a peerage granted to him during his minority.

1 P. Wms. 592.

94. Lord Trevor was of a different opinion; and held, in conformity with Lord Coke, that the King had a right to the services of his subjects, in any situation he thought proper: and instanced the case of the Crown's having power to compel a subject to be a sheriff; and to fine him for refusing to serve. He observed that, in Lord Abergavenny's case, it was admitted the King might fine a person whom he thought proper to summon to the House of Peers; it being there said, that a person might choose to submit to a fine; and if it were allowed the King might fine one for not accepting the houour, and not appearing upon the writ; the King might fine, *toties quoties,* where there was a refusal; and consequently might compel the

Idem.

subject to accept the honour. That it was not to be presumed the King would grant a peerage to any one to his wrong, any more than he would make an ill use of pardoning: all which were suppositions contrary to the principles upon which the constitution was framed, which depended upon the honour and justice of the Crown.

CHAP. II.

What Estate may be had in a Dignity.

SECT. 1. *Dignities are real Property.*
5. *What Estate may be had therein.*
7. *May be entailed.*
10. *With a remainder over.*
12. *Or granted for life.*
14. [*If* pour autre vie.]
15. *Not subject to Curtesy.*
22. *Cannot be aliened.*
28. *Nor surrendered.*
30. *Nor extinguished by a new Title.*
33. *An Earldom does not attract a Barony.*
37. *Dignities forfeited by Attainder for Treason.*
40. *But those in Remainder not affected.*
45. *And also for Felony.*
47. *Except Dignities in Tail.*
50. *Corruption of Blood.*
52. *Does not extend to entailed Dignities.*
56. *Restitution of Blood.*
60. *A Dignity formerly lost by Poverty.*
63. *Not within the Statutes of Limitation.*

SECTION I.

ALL Dignities having been originally annexed to lands, were considered incorporeal hereditaments, wherein a person might have a freehold estate. And although dignities are now become little more than personal honours, yet they are still classed under the head of real property. Dignities are real property. 3 o Ch. D. 136.

2. In conformity to this principle it was formerly held that a dignity must have been created of some particular place, in order that it might appear to be annexed to land, and thereby become a real hereditament. But Lord Holt was of opinion that this is not now necessary. 1 Inst. 20 a. 1 Ld. Raym. 10.

3. Where a person is created a baron of a particular place, that place, though a family mansion, does not however thereby become the *caput baroniæ*, so as to exclude a widow from being endowed of it.

4. Thomas Gerard having been created Lord Gerard of Gerard's Bromly, by letters patent, he being then resident of the said capital messuage, a question arose in a writ of dower, brought Gerard v. Gerard, 5 Mod. 64. 12 —— 84. 3 Lev. 401.

by the widow of a Lord Gerard, whether the said capital messuage became thereby *caput baronie*. It was resolved that it did not, because it was not a feudal barony; for the authorities cited must be intended of feudal baronies; and this privilege was allowed to them, because they ought, upon necessity, to defend the realm, to which they were bound by tenure. For the King, at the creation of the barony, gave to the baron lands and rents, to hold of him for the defence of the realm. Then this could not be a feudal barony; for it was in the seisin of the Gerards before; therefore was not given to the Gerards by the King, at the creation of the barony. The widow recovered dower.

1 Ld. Raym. 72.

What estate may be had therein.

5. While dignities were annexed to lands, the persons seised of those lands, if tenants in fee simple, must have had the same estate in the dignity; and a person might also have a qualified fee in a dignity as appears from the case of John Talbot; which has been already stated.

C. 1. s. 45.

1 Inst. 16 b.

6. As to dignities created by writs of summons, Lord Coke says,—"And it is to be observed, that if he be generally called by writ to parliament, he hath a fee simple in the barony without any words of inheritance." This expression is inaccurate; and Lord Coke has corrected it in the same page by adding, "and thereby his blood is ennobled to him and his heirs lineal."

Dignities of this kind being descendible to females, have generally been called baronies in fee: but this is not strictly so, for they are descendible only to the lineal heirs of the person first summoned.

Infra, c. 3.

May be entailed.

Nevil's case, 7 Rep. 33.

7. A dignity may be entailed within the statute *De Donis*, for it concerns land. Thus it was resolved by all the judges in 7 James, that where Ralph Nevil was, by letters patent, created earl of Westmoreland, to him and the heirs male of his body, an estate tail was thereby raised; and not a fee conditional at common law. And Lord Coke says, a name of dignity may be entailed within the statute, as dukes, marquisses, earls, viscounts, and barons; because they are named of some county, manor, town, or place.

1 Inst. 20. a. 12 Rep. 81.

8. A dignity may not only be entailed at its first creation, but also a dignity originally descendible to heirs general may be

entailed, by an act of parliament upon the heirs male of the body of the person seised thereof.

9. Robert de Vere, duke of Ireland and earl of Oxford, was attainted in 11 Rich. 2. by parliament. And in 16 Rich. 2. that prince, by assent of parliament, restored to Aubrey de Vere, and his heirs male for ever, the estate and honour of earl of Oxford.

Earldom of Oxford. Vide infra Earldom of Devon. case, c. 3. s. 76.

In the year 1626, a contest arose, in consequence of the death of Henry de Vere, earl of Oxford, respecting the right to that earldom, between Robert de Vere, claiming under the entail, created by the act 16 Rich. 2. as heir male of the body of Aubrey de Vere, and Lord Willoughby of Eresby, claiming as heir general to the last earl.

Collins, 173. W. Jones, 96.

The case was referred by King Charles I. to the House of Lords, who called to their assistance Lord Ch. Jus. Crew, Lord Ch. Baron Walter, Doddridge, and Yelverton, Justices; and Baron Trevor. Their opinion on this point was delivered by Lord Chief Just. Crew; whose exordium is so eloquent, that it shall be transcribed.

"This great and weighty cause incomparable to any other that hath happened at any time requires great deliberation, and solid and mature judgment, to determine it; and I wish that all the judges of England had heard it, (being a fit case for all) to the end we altogether might have given our humble advice to your Lordships herein. Here is represented to your Lordships *certamen honoris*; and, as I may well say, *illustris honoris*, illustrious honour. I heard a great peer of this realm, and a learned, say, when he lived, there was no King in Christendom had such a subject as Oxford. He came in with the Conqueror Earl of Gwynes: shortly after the Conquest made great chamberlain of England, above five hundred years ago, by Henry I., the Conqueror's son, brother to Rufus; by Maud the empress, earl of Oxford; confirmed and approved by Henry Fitz-Empress, Henry II. *Alberico comiti*, so earl before. This great honour, this high and noble dignity, hath continued ever since in the remarkable sirname of De Vere, by so many ages, descents, and generations, as no other kingdom can produce such a peer, in one of the selfsame name and title. I find in all this length of time but two attainders of this noble family: and those in stormy and

tempestuous times, when the government was unsettled, and the kingdom in competition. I have laboured to make a covenant with myself that affection may not press upon judgment; for I suppose there is no man that hath any apprehension of gentry or nobleness, but his affection stands to the continuance of so noble a name and house, and would take hold of a twig or twine thread to uphold it. And yet time hath his revolutions: there must be a period and an end to all temporal things—*finis rerum:* an end of names and dignities, and whatsoever is terrene, and why not of De Vere. For where is Bohun? Where is Mowbray? Where is Mortimer? Nay, which is more and most of all; where is Plantagenet? They are entombed in the urns and sepulchres of mortality. And yet let the name and dignity of De Vere stand so long as it pleaseth God."

The Lord Chief Justice and his brethren were unanimously of opinion, that although the earldom of Oxford was originally held in fee simple by the family of De Vere, yet "that the honour of the said earldom of Oxford was entailed upon Aubrey De Vere and his heirs male by the parliament of 16 Rich. 2.; and that an estate therein to the heirs male was sufficiently raised and created thereby; and was so reputed and enjoyed by many descents of the earls; which could not have been (as the same was limited) if the same had only been an ordinance of parliament: and that the said honour descended and then of right belonged to Robert De Vere, as heir male of the said Aubrey, by virtue of the entail."

Journal, Vol. 3. 537.

The House of Lords resolved accordingly, and the next day Robert De Vere took his seat as Earl of Oxford.

With a remainder over.

10. An estate in remainder may be limited in a dignity, to commence after the determination of an estate tail. Thus the earldom of Northumberland was granted to Thomas Percy and the heirs male of his body; and for default of such issue, to

7 Rep. 34. a.

Henry his brother, and the heirs male of his body.

1 Ld. Raym. 52. Fearne, Cont. Rem. 529.

11. In Lord Purbeck's case, Show. Parl. Ca. 11. it is said *arguendo* that if honours be entailed, it is not of the same nature with other inheritances. Neither doth any lord sit here by title of a remainder, but by virtue of a new grant in the same patent.

Or granted for life.

12. Lord Coke says, the King may create either a man or a woman noble for life, but not for years; because it might then go to executors or administrators.

13. There are several modern instances of dignities granted to persons for life, with remainders over to their second sons; such as the cases of the late Duke of Northumberland, and the late Duke of Montague.

14. [But it seems not so well settled that a dignity may be granted *pour autre vie*. Mr. Justice Doddridge, in his Treatise on Dignities, states, that the King may grant peerages for life, for years, and *pour autre vie;* but with respect to the latter, he adds this qualification, "as it has been said." Lord Brougham, C. in his judgment in the Earl of Devon's case, says, the Crown may grant a peerage for life, not only of the grantee, but also *pour autre vie*, and he makes the following observations. The most common way of doing this, is by a grant to the son during the life of the father, by calling the son by another title to this house; such a title will enure during the father's life, and on his death the succession will operate by way of merger, so that the two will become but one dignity. But though this is the common and usual way, it is not the only way in which such a title may be granted. The *cestui que vie* may be the ancestor of the party, or not, and then observe, my lords, what is the consequence of this singular reservation; a man does not know on one day, whether he will be noble or commoner the next. This is a known case; and yet, it seems, so contrary to all known legal principles, that on the first impression it appears quite absurd that a man should not know whether he was noble or not, unless he sent in the morning of each day to know whether the person on whose life his dignity depended was alive or dead. With reference to the uncertain nature of such a grant of nobility, I will now refer to the instance of a franchise, which is similar to the case I have just mentioned, and much more nearly resembles an honour or dignity than a real estate. It is indeed not a property, but an incident to a property. This may arise from a livery of land in my own possession, or it may exist on an estate for my life, or *pour auter vie*, and whoever may be the *cestui que vie*, I cannot go to the hustings and give my vote, unless the person on whose life my freehold depends is alive at the time; for if he has expired, though but the moment before, I am divested of my estate. This, my lords, is a strong analogy to shew that there is nothing so absurd or incongruous in honours of this kind, as might at first be supposed. In the same case,

If *pour autre vie.*

2 Dow & Clark, 203. infra, c. 3.

however, Lord Wynford, alluding to Mr. Justice Doddridge's observation, says, I think he was wise in using such caution when speaking of such a grant, for I think the King cannot grant a peerage for years, or *pour autre vie*. Is the blood of a man to be ennobled only for a time? I say no; for being once ennobled, it must remain so till crime has worked a forfeiture of its nobility. The Lord Chancellor has stated the difficulty that would exist with respect to a peer *pour autre vie*, that he must send in the morning to enquire if the *cestui que vie* is alive, before he can venture into this house to give his vote: but the difficulty is still stronger; he must enquire whether the life is in existence at the instant before he gives his vote; for if it should have expired, he will have no right to sit and vote in this house. That is a circumstance sufficient, in my mind, to show that such a peerage cannot exist.]

Not subject to curtesy.

15. While dignities were annexed to the possession of particular castles, manors, &c. the husband of a woman possessed of such castles, manors, &c. was bound to perform the services due for them to the Crown; and, amongst others, that of attendance on parliament. So that he enjoyed the dignity during the joint lives of himself and his wife.

Dugd. Sum. Pref.

Idem. Vin. on Brooke.

16. Monthermer, who married the Duchess Dowager of Gloucester, was summoned to parliament in 27 Edw. I. as Earl of Gloucester, and to all succeeding parliaments during her life: when she died, her son became Earl of Gloucester, and Monthermer was summoned as a baron.

2 Rep. 112.

1 Inst. 29 b.

17. Where there was issue, the husband became tenant by the curtesy of the dignity. Thus Lord Coke mentions a case in the reign of Hen. VI. where a person was allowed to hold the dignity of Earl of Salisbury, as tenant by the curtesy, in right of his wife Alicia, the daughter and heir of the preceding Earl, by whom he had issue.

18. In the reign of King Henry VIII., Mr. Wymbish having married a lady entitled to the dignity of Taylboys, a question arose, whether he ought to have the name of Lord Taylboys, in right of his wife, or not. The King consulted the two Chief Justices, Doctor Gardiner Bishop of Winchester, and Garter. First, the King demanded of the two Chief Justices, whether, by law, Mr. Wymbish ought to have the name of Lord Taylboys, in right of his wife, or not. They answered that the com-

mon law dealeth little with the titles and customs of chivalry: but such questions had always been decided before the constables and marshals of England. Then the King moved the questions to Doctor Gardiner, who answered, that by the law which he professed, dignity was denied both to women and to Jews. I like not that law, quoth the King, that putteth Christian women and Jews in the same predicament. That law, said Doctor Gardiner, as I take it, is to be intended of dignity, whereunto public office is annexed; for in France women succeed as well to their ancestors in dignities as in patrimonies; therefore the custom of every region is to rule those things. Then the King asked Garter of the custom of England, who answered that it had been always used so in England as in France, that the husband of a baroness by birth should use the style of her barony, so long as she lived; and if he were tenant by the curtesy, then that he might use it for term of his life. The Chief Justice confessed that custom concerning the tenant by the curtesy to be consonant to the common law; for the common law admitted him to all his wife's inheritances, of which she was seised during the coverture, and that might descend to their issue; and the dignity was parcel of the inheritance: which Doctor Gardiner confessed; adding that the law granting the more, which was the possession of the barony, could not be intended to deny the less, which was the dignity; a thing incident to it.

As it standeth with law, said the King, that tenants by curtesy should have the dignity, so it standeth with reason: but I like not that a man should be this day a lord, and to-morrow none, without crime committed; and it must so fall out in the husband of a baroness, if she die having never had by him any children.

The Chief Justice confirmed, that in that point the common law dissented not much from the King's reason; for the husband that never had issue was thought to have no interest in law in his wife's inheritance, more than in respect only that he was a husband: but having a child, then he acquired a state in law, and was admitted to do homage, and not before.

The King for resolution said, that forasmuch as by their speeches he understood that there was no force of reason or law to give the name to him that had no issue by his wife; that neither Mr. Wymbish, nor none other, from thenceforth should

use the style of his wife's dignity, but such as, by curtesy of England, had also right to her possessions, for term of his life. The which opinion the persons aforenamed applauded; and so the sentence stood.

19. Notwithstanding this recognition of the doctrine of curtesy in dignities, the claim of Richard Bertie in 1580 to the barony of Willoughby, in right of his wife, Catherine Duchess of Suffolk as tenant by the curtesy, was rejected; and Peregrine Bertie her son was admitted in the lifetime of his father.

1 Inst. 29 b. n. 1.

20. Mr. Hargrave has observed, that two other claims of a like kind were made in a few years after, but were not determined; and he could not learn that there had been any claims of dignities by curtesy since Lord Coke's time. And from the want of modern instances of such claims, as well as from some late creations, by which women were made peeresses, in order that the families of their husbands might have titles, and yet the husbands themselves remain commoners, it seemed as if the prevailing notion was against curtesy in titles of honour. However, he had not discovered whether this great question had ever formerly received the judgment of the House of Lords.

21. It may also be observed, that there are some modern instances of persons sitting in parliament as heirs to their mother's dignities, in the lifetime of their fathers, which would not have been allowed if their fathers had an estate by the curtesy in those dignities. Thus the late duke of Northumberland was allowed to sit in parliament as baron Percy, immediately upon the death of his mother, though his father was living. In the same manner the late marquis of Townsend was allowed to take his seat in parliament as baron Ferrers of Chartley, upon the death of his mother, though his father was alive.

Cannot be aliened.

22. Dignities by tenure appear to have been formerly alienable; provided such alienation was made with the licence of the Crown.

Ryley, Plac. Parl. 547—557.

23. By letters patent, 7 Edw. 2., reciting that Edmund Deyncourt (who was Baron Blankeney) having no issue male, and being desirous that his surname and arms might continue, had petitioned His Majesty for leave to enfeoff whom he pleased of his manors and arms. The King granted him his licence to enfeoff any person of his manors, &c. so as the same might

remain after his decease to William Deyncourt, and the heirs male of his body. By other letters patent, 10 Edw. 2., the King granted him his licence to enfeoff Oliver and John Deyncourt of the manor and soke of Blankeney, &c.: that the said Oliver and John should re-enfeoff the said Edmund of the same, to hold during his life, and after his decease to the said William Deyncourt and the heirs male of his body. Lord Coke says, it appears from the Close Rolls that this Edmund sat in parliament until and in 18 Edw. 2.: that after his decease his assignee sat in parliament in 1 Edw. 3. by the name of William Deyncourt; and in his heirs male the dignity, surname, and possessions continued until 21 Hen. 6., when his heir male, together with the name and dignity, ceased. 4 Inst. 126.

24. Lord Coke also says, he heard Lord Burghley vouch a record in the reign of Edw. IV., that the Lord Hoe having no issue male, by his deed under his seal, granted his name, arms, and dignity over: but having not the King's licence and warrant, the same was in parliament adjudged to be void. Idem.

25. It has been already observed that dignities by tenure have been frequently settled by the persons in possession of them, upon particular branches of the family of the settlor, in exclusion of others. And the cases of the earldoms of Warwick and Arundel, and baronies of Berkeley and Abergavenny, in which such settlements were held good, have been already stated. c. 1.

26. When dignities ceased to be annexed to the possession of lands, and came to be considered as mere personal inheritances, the right of alienating them appears to have been gradually taken away: and it became a settled rule, that a dignity was an hereditament inherent in the blood of the first grantee, and his descendants; and was therefore unalienable. See 3d Report on Dignity of a Peer, p. 17.

27. In the case of the barony of Grey of Ruthyn, the House of Lords made the following resolution:—"Upon somewhat which was spoken of in argument concerning a power of conveying away an honour, it was resolved upon the question, *nemine contradicente*, that no person that hath any honour in him, and a peer of this realm, may alien or transfer the honour to any other person." Journ. Vol. 4. 150.

28. Dignities might also formerly be surrendered to the King, of which there are several instances. It was, however, resolved Nor surrendered.

Journ. Vol. 4. 158.

by the House of Lords in 1541, "That no peer of the realm can drown or extinguish his honour, but that it descends to his descendants, neither by surrender, grant, fine, nor any other conveyance to the King."

Viscount Purbeck's case, Show. Parl. Ca. L. 1 Collins, 269, Anne 1678. Journ. Vol. 13. 122.

29. Lord Viscount Purbeck surrendered his dignity to the King by fine: after his death Mr. Villers, his eldest son, petitioned his Majesty for the title. The petition being referred to the House of Lords, it was argued on behalf of the petitioner, that this was a personal dignity annexed to the blood; and as inseparable and immoveable, that it could not be either transferred to any other person or surrendered to the Crown. It could move neither forward nor backward, but only downward to posterity; and nothing but deficiency, or a corruption of blood, could hinder the descent.

The Attorney-General (Sir William Jones) endeavoured to support the surrender upon the authority of several ancient precedents. The House of Lords resolved,—"Forasmuch as upon debate of the petitioner's case, who claims the title of Viscount Purbeck, a question in law did arise, whether a fine levied to the King by a peer of the realm of his title of honour can bar and extinguish that title. The Lords spiritual and temporal, in parliament assembled, upon very long debate, and having heard his Majesty's Attorney-General, are unanimously of opinion, and do resolve, that no fine now levied, or at any time hereafter to be levied to the King, can bar such title of honour, or the right of any person claiming under him that levied or shall levy such fine."

Journ. Vol. 13. 252.

Nor extinguished by a new title.

30. It appears to have been formerly doubted whether a barony created by writ was not extinguished by the acceptance of a new barony of the same name. Thus in the case of Lord Delawarre, it was resolved in parliament, 39 Eliz., that a grant of a new barony of Delawarre to William West, who was not then in possession of the ancient barony of Delawarre did not merge or extinguish the ancient barony, but that if William West had been a baron entitled to, or in possession of the ancient barony, when he accepted the creation, the law perchance might have been otherwise; but that remained unresolved.

11 Rep. 1. Collins. 122. See Nicholas's Report of the L'Isle Peerage Case, p. 80. n.

31. It seems, however, to have been soon after settled, that the acceptance of a new dignity did not merge or destroy an

ancient one; for Lord Coke says—"That the greater dignity doth never drown the lesser dignity, but both stand together in one person: and therefore if a knight be created a baron, yet he remaineth a knight still; and if the baron be created an earl, yet the dignity of a baron remaineth, *et sic de cæteris.*" 2 Inst. 594.

32. In the case of the barony of Willoughby de Broke, it was resolved by the House of Lords, that the grant of a new barony of Willoughby de Broke to Sir Foulk Greville, by letters patent to him and the heirs male of his body, he being then in possession of the ancient barony by writ, did not destroy such ancient barony, but the same continued and descended to his sister and sole heir, and from her to Sir Richard Verney, who was seated in the House of Lords according to the date of the ancient barony. Collins, 321. 325. Infra, c. 3.

33. An opinion formerly prevailed, that where a person having a barony by writ, and consequently descendible to his heirs general, was created an earl, to him and the heirs male of his body; the earldom attracted the barony, so that they could not be afterwards separated. An earldom does not attract a barony. Collins, 162.

34. This doctrine was fully exploded in the case of the barony of Grey of Ruthyn, in which it appeared that Lord Grey, being a baron by writ, was created earl of Kent, by letters patent, to him and the heirs male of his body; and had issue two sons, the eldest of whom became earl of Kent, and died leaving issue a daughter only. It was resolved that the barony descended to the daughter, and the earldom to the younger brother, and that the earldom did not attract the barony. Collins, 195. 1 Inst. 15. b. n. 3. Journ. Vol. 4. 149.

35. So where the earldom becomes extinct, the barony will notwithstanding descend to the heir general.

36. In the year 1669, the claim of Benjamin Mildmay to the barony of Fitzwalter was heard before the King in council, in the presence of the two Chief Justices, and Lord Ch. Baron Hale, the King's Chief Serjeant, and the Attorney and Solicitor-General. The petitioner deduced his pedigree from Robert Fitzwalter, who was summoned to parliament by writ in 23 Edw. I. and several times after. The title descended to Robert Fitzwalter, who was created Viscount Fitzwalter and Earl of Sussex. This Earl of Sussex had two sons; Henry Earl of Sussex, and Sir Humphrey Ratcliffe: Henry had two sons; Thomas Earl of Collins, 286.

Sussex, who died without issue, and Henry Earl of Sussex, who left one son, Robert Earl of Sussex, and one daughter, Lady Frances, who married Sir Thomas Mildmay, to whom the petitioner was heir. The counsel on the other side insisted that the barony was merged and extinct in the earldom, by coming to Edward the last Earl of Sussex, who died without issue.

The question being put to the judges, they unanimously agreed, that "if a baron in fee simple be made an earl, the barony will descend to the heir general, whether the earldom continue or be extinct." With which opinion and resolution his Majesty being fully satisfied, a writ of summons was issued to Mr. Mildmay, under which he took his seat as Baron Fitzwalter.

Dignities forfeited by attainder.

37. Every kind of dignity is forfeited by the attainder for treason of the person possessed of it, and can only be revived by a reversal of the attainder.

Nevil's case, 7 Rep. 33.

38. Charles Nevil Earl of Westmorland, to him and the heirs male of his body, by letters patent, was attainted of high treason by outlawry, and by act of parliament; and died without issue male: upon which Edward Nevill, in 2 Jac. I., claimed to be Earl of Westmorland, as heir male of the body of the first grantee.

It was resolved by all the judges, that although the dignity was within the statute *De Donis Conditionalibus*, yet that it was forfeited by a condition in law, *tacitè* annexed to the estate of the dignity. For an earl has an office of trust and confidence; and when such a person, against the duty and end of his dignity, takes not only council, but also arms against the King, to destroy him, and thereof is attainted by due course of law, by that he hath forfeited his dignity; in the same manner as if tenant in tail of an office of trust misuse it, or use it not; these are forfeitures of such office for ever, by force of a condition in law *tacitè* annexed to their estates. It was also resolved, that if it had not been forfeited by the common law, it would have been forfeited by the statute 26 Hen. 8.

Tit. 2. c. 2.

39. Persons upon whom judgment of high treason is pronounced, or who are outlawed upon an indictment for high treason, are said to be attainted of high treason. A person may also be attainted of high treason by a special act of parlia-

ment, of which there are many instances. And all the ancient acts of attainder are considered as having been passed, and operate from the first day of the sessions of parliament in which they were made. Viscounty of Strathallen, printed case, 1787. Treat. of Dignities, c. 4.

40. Where a person is tenant in tail of a dignity, with remainder in tail to another, and the first tenant in tail is attainted of high treason, the dignity is forfeited, as to him and his descendants: but upon failure of such descendants, it becomes vested in the remainderman. But those in remainder not affected.

41. Thomas Percy, who was Earl of Northumberland, to him and the heirs male of his body, remainder to his brother Hugh Percy, in the same manner was attainted of high treason and executed, having no issue male; upon which Hugh Percy became Earl of Northumberland. 7 Rep. 34 a. Collin's Peer. Vol. II. 321.

42. The celebrated Henry St. John was created Viscount Bolingbroke in 1712, to him and the heirs male of his body; remainder to his father, Sir Henry St. John, and the heirs male of his body. Lord Bolingbroke was attainted of high treason in 1715, by act of parliament; and though he afterwards obtained a partial repeal of the act of attainder, yet his dignity was never restored. Upon his death without issue in 1751, Frederick St. John, the grandson, and heir male of the body of Sir Henry St. John, succeeded to the estate in remainder in the dignity. The entry in the Journals is,—"Frederick, Viscount Bolingbroke, claiming by virtue of a special limitation contained in a patent granted to his uncle Henry, late Viscount Bolingbroke, dated 7th July, 11 Anne, was introduced in his robes, and took his seat." Vol. XXVIII. 204.

43. The issue must be capable of inheriting the dignity, otherwise the remainder will take effect.

44. Thus in the case of Gordon *v.* The King's Advocate, the following question was put to the judges by the House of Lords. —"Tenant in tail male of lands in England, with remainder over, is attainted of high treason, and the estate tail thereby forfeited to the Crown; after this attainder tenant in tail has issue male born in foreign parts, out of the ligeance of the Crown of Great Britain, and dies, leaving such issue male. *Quære*, Is the estate or interest in the lands which were forfeited to the Crown as aforesaid, continuing or determined?" Printed cases, Dom. Proc. 1754.

The Lord Chief Baron having conferred with the other Judges

present, delivered their unanimous opinion, that the estate or interest in the lands so forfeited to the Crown as aforesaid, was determined. In consequence of which the person in remainder recovered the estate from the Crown.

And also for felony.

45. A dignity created by writ, and descendible to heirs general is also forfeited by attainder for felony of the person possessed of it. For Lord Coke says, if he was noble or gentle before, he and all his posterity are, by the attainder, made ignoble.

1 Inst. 41 b.

46. Mervin Touchet, Baron Audley by writ in England, and Earl of Castlehaven, in Ireland, was attainted of felony, and executed in 1631. His son was created Lord Audley, and Earl of Castlehaven, by King Charles I.; and having faithfully served that prince, he obtained an act of parliament 29 and 30 Cha. 2. intituled "An act for restoring the honour of Baron Audley, of Hely, to James Lord Audley, and others therein mentioned."—And the Lords Audley have ever since had precedence according to the date of the ancient barony.

Except dignities in tail.

47. But an entailed dignity is not forfeited by attainder of felony, except during the life of the person attainted; for the statute 26 Hen. 8. c. 13. by which estates tail are made forfeitable for high treason, does not extend to attainders for felony.

48. Charles Lord Stourton, to him and the heirs male of his body, was convicted of murder, and executed in 1557. He left three sons. John, the eldest, received a writ of summons to parliament in 1575; and was placed immediately above Lord Latymer, in the seat of his ancestor. In Dugdale's Baronage, it is said, that this John was restored in blood, by act of parliament: but this is a mistake; for though an act was brought in for the restitution of blood of John Lord Stourton, yet that was on the 7th of March following, on which day, as appears from the journals, he sat in the house; so that the object of the act must have been to enable Lord Stourton to derive pedigree through his father; and the act never passed.

Journ. Vol. 1. p. 731.

Id. p. 742. 3 And. 9.

Eden's Rep. Ap.

49. Lawrence Earl Ferrers, to whose ancestor the dignity had been granted by letters patent in 1711, to hold to him and the heirs male of his body, was convicted and executed for murder, in the year 1760. But having left no issue, the dignity was not

Journ. Vol. XXIX. 690.

forfeited, but descended to his brother Washington Ferrers, who took his seat accordingly.

50. In the case of a dignity descendible to heirs general, the attainder for treason or felony of any ancestor of a person claiming such dignity, through whom the claimant must derive his title, though the person attainted was never possessed of the dignity, will bar such claim; for the blood of the person attainted, being corrupted, no pedigree can be derived through him; so that the dignity becomes vested in the Crown by escheat, and is thereby destroyed. Corruption of blood. Tit. 29. c. 2.

51. In 1723, the Reverend Robert Lumley Lloyd claimed the barony of Lumley, which was created by writ of summons in 8 Rich. 2. as heir to Ralph Lord Lumley, the person first summoned to parliament. It appeared that the title had descended to John Lord Lumley, and that George Lumley his eldest son was attainted of treason, and died in the lifetime of his father, leaving issue John Lumley, who died without issue; and that Spandian Lloyd was his cousin and next heir, viz. eldest son of Barbara Williams, sister of the said John Lord Lumley. That Spandian Lloyd died without issue; and that Henry Lloyd his next brother had issue Henry his eldest son, who was father to the claimant. Barony of Lumley. Hale P. C. p. 1. 356.

The House of Lords resolved that the petitioner had not any right to a writ of summons to parliament, as prayed by his petition.

52. In the case of entailed dignities, no corruption of blood takes place. A dignity in tail may, therefore, be claimed by a son surviving an attainted father, who never was possessed of the dignity. For the son may in such a case claim from the first acquirer, *per formam doni*, as heir male of his body, within the description of the gift, without being affected by the attainder of his father, or any other lineal or collateral ancestor. Does not extend to entailed dignities. Tit. 29. c. 5. 2 Hale P. C. 356.

53. In 1764, John Murray presented a petition to his Majesty, stating that his grandfather John Marquis of Athol was by letters patent created Duke of Athol, to him and the heirs male of his body. That the said Duke of Athol died in 1725, leaving James his eldest son, who succeeded to the title, and George his second son, who was the petitioner's father. That the said George was in the year 1745 attainted of high treason, by act of parliament; Dukedom of Athol. Journ. Vol. XXX. 466—469.

and died in 1760, leaving the petitioner his eldest son. That James, the second Duke of Athol, died in 1764, without leaving any issue male. That the petitioner had consulted many gentlemen learned in the law of England, particularly the Honourable Charles Yorke, Sir Fletcher Norton, and Mr. De Grey, whether the said attainder, under the circumstances of the case, could be any bar to the petitioner's succeeding to the said title upon the death of his said uncle, James Duke of Athol; and the said gentlemen were unanimously of opinion, that as by the law of England in a like case, no objection could arise from the said attainder; and as by the statute of 7 Anne, all persons attainted of treason in Scotland were liable to the same corruption of blood, pains, penalties, and forfeitures, as persons convicted or attainted of high treason in England, the petitioner would be clearly entitled to succeed to the said honours. The petitioner, therefore, prayed that proper directions should be given for having the petitioner's right declared and established.

This petition was referred to the House of Lords, who resolved that the petitioner had a right to the title claimed by his petition.

54. In the above case, the person attainted died in the lifetime of the ancestor who was possessed of the dignity: but in the following case, the person attainted having survived the ancestor who was possessed of the dignity, the Judges were of opinion that the dignity returned to the Crown, and could not be claimed by any collateral relation of the person attainted.

Airlie earldom, printed case, 1812.

55. Walter Ogilvy claimed the earldom of Airlie, in 1812, stating that by letters patent in 1639, James Ogilvy, then Lord Ogilvy, was created Earl of Airlie, to him and his heirs male, that the title descended to David Earl of Airlie, who had two sons, James and John. James was attainted of high treason in 1715, and survived his father, but died without issue about the year 1730. That John Ogilvy did not assume the title, but was vested in the family estates. That the said John had two sons, David, who was attainted of high treason in 1746, and Walter. That David, after remaining abroad for several years, received his pardon; and an act of parliament was passed removing some of the incapacities and disabilities occasioned by his attainder. That the said David died in 1803, leaving an only son, who died

a bachelor in 1812, by which the estates and dignities devolved on the said Walter Ogilvy.

The case was heard before the committee of privileges; and the lords conceiving that a question of English law arose, as to the effect of the two persons attainted having survived their ancestors, the Attorney-General was desired to attend, and state his objection to the claim.

The Attorney-General admitted that the petitioner had clearly established his pedigree as grandson to David, third Earl of Airlie, and that the petitioner's right to the earldom would be indisputable if it were not for the attainders of his uncle, and of his brother. That the only material fact upon which any question could arise was, that the attainted person survived the ancestor in whom the title vested at the time of the attainder; which was the same in both. That in the cases cited by the claimant's counsel, the estate tail was created by a subject: but the law was quite different where the grant of an estate tail was made by the Crown, with the immediate reversion in the King. In such case the King was in by reverter to his original title; and had not a base fee dependent upon the continuance of the grantee's issue, as he would if the entail had been created by a subject, a distinction fully stated by Lord Hobart, in Sheffield *v.* Ratcliffe, respecting estates tail; where the remainder or reversion was in a subject, and where it was in the Crown. "It is plain (says Lord Hobart) that a tenant in tail with reversion in the Crown, if he be attainted, his blood is corrupted, and his estate tail ceaseth upon his death, and the land reverteth to the King in possession."

That the 26 Hen. 8. was not to be construed as a penal law; but as a law introduced for the benefit of the Crown, and as a remedial law for the discouragement of treason. Therefore when an estate in fee tail was created by a subject, the statute should not operate to corrupt the blood of the tenant in tail by attainder, but to vest his estate, as a base fee, in his Majesty; because it would, by corrupting the blood, destroy the estate tail, and give it to the person in remainder or reversion. But when the estate tail was created by the Crown, and the immediate reversion was vested there, the attainder operated to corrupt the blood, and thereby to defeat the estate tail, and thus give an immediate effect to the reversion; placing the King at once in

as of his original estate, instead of vesting in his Majesty a base fee, with a reversion expectant thereon. If, therefore, the operation of the statute was to corrupt the blood, whenever the reversion was in the Crown, all such estates were put out of the protection of the statute *De Donis*, and were extinguished by attainder for treason, in the same manner as a base fee would have been previous to the statute. Supposing the claimant's counsel to be right in contending, that a dignity which was never vested in the heir in tail, previous to his attainder and death, was not subject to forfeiture, and that the heir should succeed to it; the next point is, whether if the presumptive heir, though attainted before the death of the tenant in possession, does in fact survive him, the estate is forfeited under the words of the statute "shall lose and forfeit to the King, his heirs and successors, all such lands, tenements, and hereditaments, which any such offender shall have of any estate of inheritance in use or possession, by any right, title, or means, &c. at the time of any treason committed, or at any time after."

It was contended on the other side, that the words, "at any time after," referred to the time of the attainder, which they considered as a civil death, and that it did not extend to such estates as opened to him after the attainder. This act was made for the benefit of the Crown; and was remedial, being designed to intimidate traitors, and to suppress treason. These objects were most effectually provided for by preventing the succession of other members of the family, by means of collateral limitations. The words "at any time after" were sufficiently extensive to cover all cases of descent which occurred, as well after the attainder, as between that period and the commission of the treason; they were entitled therefore to that construction which should suppress the mischief, and advance the remedy. But it had been argued that an attainted person was incapable of taking the estate for the purpose of inheritance or enjoyment, and consequently that he had nothing subsequent to the attainder which could be the subject of forfeiture. Co. Lit. 13 *a.*, and Cro. Car. 477. had been cited as authorities. But in opposition to this doctrine he might observe, that in Lord Hale's note on the passage in Co. Lit. as stated by Mr. Hargrave, it is laid down—if A. enfeoffs B. attainted of treason, to the use of C., the King shall have the land discharged of the use. And

Pimb's case is cited from Moore 196. However true this law might be as to estates in fee simple, he doubted much whether it was correct as to estates tail. By the statute *De Donis* the blood of an attainted tenant in tail was so far preserved from corruption, that the estate was transmissible through him to the next heir. And he had thus a capacity secured to him of taking to that extent. But 26 Hen. 8. did not, according to the agreement of the claimant's counsel, corrupt the blood, but rather prevented that corruption which would be the result of an attainder, by the common law, in order to preserve the estate tail for the benefit of the Crown, so long as the attainted person had issue; and for those in remainder, where a remainder existed. If, therefore, he was to be considered as so far capable of taking the inheritance, as to transmit it to the next heir, previous to 26 Hen. 8. that act could not be said to take away a capacity which it was for the benefit of the Crown to preserve, more especially when the words were sufficiently general, not only to admit of such a construction, but to require one more consonant to the spirit and meaning of the Legislature. As to the precedents which had been cited, they differed from this case in the material circumstance that the attainted heir did not in any of them survive the tenant in tail. In the Duke of Athol's case, it appeared from the petition of John Murray, that his father, John Murray, who was attainted, died in 1760, while his uncle, Duke John, to whom he claimed to succeed, survived till 1764. Lord Bolingbroke's case, which was relied on, and considered by the petitioner to be in point, seemed to admit of a distinction not less material. In that case a remainder was limited to the father, Viscount St. John, in tail male, upon failure of the estate in tail male previously limited to his son Henry, the first Lord Bolingbroke. This could only take effect in possession upon the death of Henry the son without issue male. The very nature and object of the grant was to postpone the father, and the heirs male of his body to his son and the heirs male of his body. The remainder to the father would not take effect until the preceding limitation to the son was gone and spent. During the son's life his estate tail in the dignity was divested out of him by the attainder; but it was in existence, and vested in the Crown by forfeiture; and it seemed very difficult to conceive how the father's remainder could descend, upon the father's

death, to his son, when by the very nature and terms of the creation, neither he nor his issue could by possibility enjoy the dignity. He contended, therefore, that in the true spirit and meaning of the grant, he was excluded altogether from the succession under the limitation. That it never did descend upon him; and that the next heir male to the father, Viscount St. John, succeeded directly to the title, as heir to his father, pointed out by the limitation.

He concluded with submitting to the Lords, that a title to the earldom of Airlie had not been made out by the petitioner.

In the next sessions the claimant presented an additional case, (*a*) in which it was contended, that in consequence of the statute *De Donis*, those estates that were conditional fees at common law became estates tail, and were protected from forfeiture for high treason, except during the life of the offender, and also from corruption of blood. Thus Littleton, s. 747, after stating that where a man is attainted or outlawed for felony, his blood is corrupted, proceeds in these words, "But the issue in tail, as to tenements tailed, is not in such case barred, because he is inheritable by force of the statute, and not by course of common law; and, therefore, such attainder of his father, or of his ancestor in tail, shall not put him out of his right, by force of the tail, &c." Thus stood the law till the statute 26 Hen. 8. c. 13. by which it was enacted that every person convicted of high treason, "shall lose and forfeit such lands, tenements, and hereditaments which any such offender or offenders shall *have* of any estate of inheritance in use or possession by any right, title, or means, at the time of any such treason committed, or at any time after; saving to every person and persons, their heirs and successors, (other than the offenders in any treason, their heirs and successors,) all such rights, titles, &c. which they shall have at the day of the committing such treasons, or at any time afore."

1 Inst. 392 b.

Under the general words of this statute, estates tail became forfeitable for treason: but it was laid down by the Court of Exchequer in Dowtie's case, 3 Rep. 10. "That neither the act nor the attainder makes any corruption of blood as to the descent of land in tail; for Popham, Attorney-General, said that

(*a*) The additional case was prepared by Mr. Cruise, the Author of this Work.

so it was agreed in the case of Lord Lumley; that where there was grandfather, father, and son, and the grandfather was tenant in tail, and the father was attainted of high treason, and died in the life of the grandfather, and afterwards the grandfather died, that the land should descend to the son, notwithstanding the attainder of the father; for the father had not the land, neither in possession nor in use, in which two cases the act of 26 Hen. VIII. gave the forfeiture only; and his attainder is not any corruption of blood, for the land entailed." Cro. Eliz. 28. 8 Rep. 166 a.

It follows that in all cases of claims by an issue in tail to lands entailed, a pedigree may be deduced through an attainted person. And in the case of Lord Lumley, the grandson must have been allowed to deduce his pedigree through his father, though the father was attainted of high treason. The Attorney-General had contended that where the grant of an estate tail was made by the Crown, with the immediate reversion in the Crown, the King, in case of attainder of the tenant in tail, is in by reverter to his original title, the blood of the tenant in tail being corrupted, and has not a base fee dependent upon the continuance of the grantee's issue; in support of which he has cited the *dictum* of Lord C. J. Hobart, already stated. It would be necessary to state the legal principles upon which this assertion was founded. In the case of an estate tail, with the remainder or reversion in a subject, as the attainder of the tenant in tail cannot affect the person in remainder or reversion, the estate becomes forfeited to the Crown during the life of the tenant in tail, by the enacting part of the statute, and also remains in the Crown during the existence of any issue of the tenant in tail, by the saving, out of which the heirs of the offender are excluded; so that the Crown in that case acquires a base fee, as long as there are any heirs of the body of the tenant in tail. But in the case where the immediate reversion in fee is in the Crown, it was contended, but not resolved, in Walsingham's case, that the Crown should have the land by way of reverter, and not by way of forfeiture. In that case the tenant in tail, previous to his attainder, had made a feoffment in fee; and the real question was, whether that feoffment operated as a discontinuance; for if it did, the forfeiture would have been saved, as will be shewn hereafter. The same question again arose in the case of Stone *v.* Newnham; and was repeat- Plowd. 559. Cro. Car 427.

edly argued in the Exchequer Chamber, where it was resolved that the right of the estate tail was forfeited, because the feoffment could not operate as a discontinuance, the reversion always remaining in the Crown. The Attorney-General had contended that these decisions justified the *dictum* of Lord Hobart, that the statute 26 Hen. VIII., which creates a forfeiture of estates tail, is a remedial, and not a penal law. That where the reversion is in the Crown, the blood of the tenant in tail is corrupted: but where there is a remainder or reversion in a subject, the blood is not corrupted, because such a construction would operate to destroy the estate tail, and deprive the Crown of the forfeiture; for in that case the estate would go to the person in remainder or reversion.

This exposition of the statute was perfectly new. The first part of it rested solely on the authority of Lord Hobart: but it was observable that nothing similar to that *dictum* was elsewhere to be found. It was true that where a tenant in tail, with the immediate reversion in the Crown, was attainted of high treason, he forfeits his estate not only for his own life, but also during the existence of any issue of his body, because the issue are excluded by the saving. It does not, however, follow that his blood is corrupted; that would be directly contrary to all the resolutions on the statute. Lord Hobart's zeal for the Crown, and indignation against the traitor, by which he candidly acknowledges himself to have been moved in pronouncing that judgment, instigated him to go somewhat too far in advancing an extrajudicial opinion, not warranted by the authorities he cited, nor admitted by any subsequent writer. For neither Lord Hale nor Serjeant Hawkins, who have given very able expositions of this statute, and also of Walsingham's case, and that of Stone *v.* Newnham, have adopted, or even noticed, Lord Hobart's *dictum:* but have distinctly stated that in both the cases abovementioned the Crown acquired the estate by forfeiture.

Hob. R. 335.

Hale, P.C. Vol. 1. 242.
Hawk. B. 2. c. 49. s. 18 & 24.

The second part of the Attorney-General's exposition of the statute is equally unfounded; for where there is a remainder or reversion in a subject, the statute, as has been already stated, vests the estate in the Crown, during the life of the tenant in tail, under the enacting clause, and bars the issue, by excluding them from the benefit of the savings, so as to vest a base fee in the Crown, even if the blood were corrupted; for such con-

ruption of blood would disable the issue in tail from inheriting, and the person in remainder could not take as long as there was issue of the tenant in tail; consequently the Crown would be entitled to hold the estate during that period.

But admitting the *dictum* of Lord Hobart to be good law, still it would not affect the present case, for it does not contravene the doctrine established ever since the statute 26 Hen. VIII. was made, and which will be stated hereafter, that a person must actually have an estate tail, to be capable of forfeiting it under that act; and here neither of the persons attainted ever had any estate in the dignity claimed; nor the doctrine established in Lord Lumley's case, that the attainder of the heir in tail is not attended with corruption of blood, *quoad* the estate tail.

The Attorney-General contended that if the presumptive heir, though attainted before the death of the tenant in possession, does in fact survive him, the estate is forfeited, because the statute 26 Hen. VIII. being made for the benefit of the Crown, and remedial, the words "or at any time after," are sufficiently extensive to cover all the cases of descent which occur, as well after the attainder, as between that period and the commission of the treason. To this argument a full answer may be given; for, first, a tenant in tail can only forfeit what he has; second, a person attainted cannot take an estate tail by descent, and consequently cannot have it to forfeit.

With respect to the first of these propositions the statute 26 Hen. VIII. has, down to the present time, been construed so strictly, that the tenant in tail must actually *have* the estate tail, in order to be capable of forfeiting it. Thus it has been decided that where a tenant in tail, with the reversion in a subject, made a feoffment in fee of his estate, and afterwards was attainted of treason, the feoffment operated as a discontinuance, and the offender not having the estate tail in him at the time of the attainder, there was no forfeiture.

Where the immediate reversion was in the Crown, there was no discontinuance of the estate tail; and therefore it was not forfeited, as has been already mentioned.

The principle of these decisions is, that a right of entry is forfeited to the Crown, under the statute 26 Henry VIII. but not a right of action. Now where the tenant in tail, with remainder to

a subject, discontinues his estate, his issue has only a right of action, which is not forfeited: but where the immediate reversion is in the Crown, the tenant in tail cannot create a discontinuance; so that a right of entry remains in the issue, which is forfeited to the Crown.

1 Inst. 336 a.

Cont. 7. Ca. 21.

Judge Jenkins states that where a tenant in tail discontinued, and the discontinuee made him a lease for his life, and afterwards he was attainted, the estate tail was not forfeited; for, says he, in this case, at the time of the treason, he had not any estate to forfeit, as the said statute 26 Henry VIII. requires. Thus, it appears, that unless the tenant in tail actually has the estate in him, there is no forfeiture. And Lord Coke states the effect of the statute in these words:—"If tenant in tail in possession, or that hath a right of entry, be attainted of high treason, the estate tail is barred, and the land is forfeited to the King."

With respect to the second proposition, it will not be necessary to cite many authorities to prove that a person attainted cannot take any estate by descent; that of Lord Coke will be quite sufficient:—"If a man be attainted of treason or felony, although he be born within wedlock, he can be heir to no man."

1 Inst. 8 a.

This doctrine applies equally to an heir in tail, who was incapable, as well before the statute 26 Henry 8. as since, of taking an estate tail by descent. This is clear upon principle, because the disability created by an attainder is general; and is also confirmed by the following authorities; in which, it is said, that where the issue in tail is attainted of felony, he cannot take the estate tail by descent: but it either vests in the Crown, or becomes the property of the first occupant, during the life of the attainted person.

B. Pl. 5. Tit. Forfeiture, Pla. 37.

In Viner's Ab. tit. Blood Corrupted, is the following translation of a passage from Brooke's Ab.—"Where the issue in tail is outlawed of felony, in the life of the ancestor, and gets a pardon in the life of the ancestor, he may enter after the death of his ancestor, as heir in tail; *contra*, of fee simple. But if the ancestor dies before the pardon, then it seems, by Thorpe, that the heir in tail cannot enter. The reason seems to be inasmuch as the King shall have the land during the life of the outlaw."

The same doctrine is laid down by Brooke, and appears to be deduced from a case in the year books, which is thus stated and reasoned upon by Plowden, 557, 8.—" Tenant in tail was bound in a statute merchant; and the issue was outlawed for felony, and obtained a charter of pardon, in the life of the father. The father died, the issue entered, the conusee sued execution of the land, and the heir brought an assise. Whether or no the assise was maintainable was there debated. The principal point argued was, what estate the issue had; for if he had an estate tail, then the assise was maintainable, for then he was remitted to his estate tail, in which case execution could not be issued against him; and if the issue had a fee simple, or any other estate than an estate tail, then the assise was maintainable. And there it appears that the outlawry for felony so disabled him in blood, that he could not take by descent the land in tail, any more than the land in fee simple, notwithstanding the charter of pardon, which could not restore his blood to its former purity. From whence it follows that when his father died, the land could not revert to the donor, because the donee had issue, *and the issue could not take by descent by reason of his disability*. So that upon the death of the father the freehold in deed or in law was none, but *in nubibus*, as it is where tenant *pur autre vie* dies in the life of *cestui que vie*, and none enters: in which case every man in the world has an equal title to the land; and, therefore, when the issue in tail entered, he was but an occupant."

Tit. Descent. Pla. 23. 29 Assises, Pla. 61.

In a note of Lord Hale, published by Mr. Hargrave, the doctrine of the case in 29 Assise is thus stated:—" The issue in tail attainted, *in vitâ patris*, after the death of the father the donor cannot enter: but the issue, if pardoned, may enter and hold as special occupant, subject to the charges of the father."

1 Inst. 22 a. n. 3.

Thus it appears at common law the issue in tail, if attainted of felony, and *à fortiori* if attainted of high treason, is incapable of taking an estate tail by descent; and there is surely nothing in the statute 26 Henry 8. to enable him to inherit. Before that statute if a tenant in tail was attainted of treason, the estate tail was forfeited to the Crown during the life of the tenant in tail: but upon his death his issue became entitled to it.—

Vin. Abr. tit. Forfeiture, C. Pla. 4. Fen. Abr. tit. Attainder, Pla. 1.

" Where tenant in tail is attainted of treason before the statute 26 Henry 8. his son shall have the land, for he does not claim only as his heir, but by the statute, *Et per formam doni.* Now, as the only object of that statute was to destroy the descent to the issue of an attainted person, it is impossible to construe it so as to give an attainted issue a capacity of inheriting, which he had not before.

Mr. Attorney-General advanced a singular argument as to this point. He said, that as an attainted person was so far capable of taking the inheritance as to transmit it to the next heir, previous to the statute 26 Henry 8. that act cannot be said to take away a capacity which it is for the benefit of the Crown to preserve: more especially where the words are sufficiently general. A proposition is here assumed which is not law; for it has been shewn that a person attainted was incapable of taking an estate tail by descent, before or since the statute 26 Henry 8. The capacity of taking by descent is here confounded with, or deduced from, the capacity of transmitting; though perfectly different. It is true that the issue in tail, though attainted, may be the means of transmitting an estate tail; because as his blood is not corrupted *quoad* an estate tail, a title may be deduced through him: but that does not give him the power of taking the estate tail by descent; for corruption of blood, as Mr. Yorke properly describes it, is a consequential disability, which affects the heirs of an attainted person, but does not affect himself. A person attainted is equally incapable of inheriting, whether his blood be corrupted or not: the only difference is, that where his blood is not corrupted, a pedigree may be deduced through him; where his blood is corrupted, it cannot.

In the case of an estate in fee simple, the attainder of the heir apparent does not create a forfeiture of the estate, because a person can only forfeit what he has. Upon the death of the ancestor, the estate will escheat to the lord of the fee, because the heir cannot take by descent, on account of his attainder; and his blood being corrupted, no other person can derive a title through him. If the King be lord, he will take by escheat, not by forfeiture. If the land be held of a mesne lord, it will escheat to him.—" The father is seised of lands in fee simple holden of J. S.: the son is attainted of treason, the father dieth, the lands shall escheat to J. S. *propter defectum sanguinis*, for that the

1 Inst. 13 a.

father died without heir; and the Xing cannot have the land, because the son never had any thing to forfeit.

In the case of estates tail there can be no escheat, for escheats are only of the fee simple. The attainder of the heir disables him from taking during his life: but his blood not being corrupted, the next heir, though lineal, may after his death derive a title to the estate through him. Fitz. N. B. 143.

The reason of inserting the words, " or any time after," in the statute 26 Henry 8. will plainly appear upon an examination of the law of forfeiture in cases of fee simple estates, and the object of the Legislature in making the statute 26 Henry 8.

Lord Hale says,—" The relation of the forfeiture or escheat of lands, for treason or felony, to avoid all mesne incumbrances, is to the time of the offence committed." If this were not the law, a person indicted for treason might, on the eve of his trial, convey all his real estates to his children, and thus deprive the Crown of the forfeiture. It is therefore settled that all real property whereof a person is seised at the time of the offence committed, or at any time after, down to the attainder, becomes forfeited to the Crown. P. C. Vol. I. 360.

As to any lands acquired after the attainder, they also become the property of the King, upon another principle, namely, that a person attainted is civilly dead, and can only purchase for the benefit of the Crown. Thus Lord Coke says,—" And if a man be attainted of felony, yet he hath capacity to purchase to him and his heirs, albeit he can have no heir: but he cannot hold it, for in that case the King shall have it by his prerogative, and not the lord of the fee; for a man attainted hath no capacity to purchase, being a man *civiliter mortuus*, but only for the benefit of the King." 1 Inst. 2 b.

It is the same where a person is attainted of treason. A person committed treason in 18 Eliz. for which he was attainted eight years after. Between the commission of the treason and the attainder, lands were conveyed to him to certain uses. It was held by Plowden, Popham, and others, that the estate of the land was in the Queen, because she was entitled to all lands that traitors had at the time of the treason, or after. Now as the framers of the statute 26 Hen. 8. must have been sensible that they were making a penal law, by creating a forfeiture, where there was none before, if they had contented themselves Pimb's case, Moo. Rep. 196.

with enacting that persons convicted of treason should forfeit all the lands and tenements which they had at the time of such treason committed, those words would not extend to lands acquired by purchase or descent, subsequent to the time when the treason was committed, and prior to the attainder. They therefore added the words, " or any time after," to take in the intermediate period. But these words can never be extended to the time after the attainder, because the attainted person becomes, by the attainder, incapable of taking by descent; and can only take by purchase, for the benefit of the Crown.

The Attorney-General began and ended his argument by observing, that the present case differed from Lord Lumley's, and that of the Duke of Athol, in this material circumstance, namely, that in those cases the persons attainted died in the lifetime of their ancestors: but in this the persons attainted survived their ancestors. He did not, however, cite any authority, neither an adjudged case, nor a *dictum*, nor deduce any argument, either from principle or analogy, to prove the importance of this difference; or that an estate in land, or a dignity, would be forfeited or destroyed by reason of such survivorship. Now with respect to estates in land, it is laid down by Lord Hobart, that an estate tail may cease for a time, and yet rise again; and may cease as to one person, and be in force and *esse* to another. Thus where a tenant in tail dies, leaving his wife pregnant, the reversioner may enter: but upon the birth of a child, the estate tail will revive; and in the case already stated from Brooke, it is said by Thorpe, that the estate would vest in the Crown during the life of the outlaw only; and as the donor is excluded, the next issue must of course have succeeded to it, upon the death of the outlaw.

Hob. Rep. 361.

7 Rep. 8 b.

In Plowden it is said *arguendo*, that the estate would go to the first occupant; this however appears to be an erroneous opinion. And in the case of Thornby *v.* Fleetwood respecting the statute 1 Jac. 1. by which it was enacted, that if any person should pass or go, or send beyond sea any child to reside in a college of Jesuits, every such person so passing, or being sent beyond sea, should as in respect to himself only, and not in respect of any of his heirs or posterity, be disabled and made incapable to inherit, purchase, take, have, or enjoy any manors, lands, &c. Mr. Justice Powys is reported to have said,—

"But when the argument that the profits only are forfeited prevails, there arises a subpoint, who shall have the profits? I say the King shall have them. 1. Because he is concerned to see the law executed. 2. There are goods in the case, as well as lands,—and who can have them but the King? 3. This is an offence of a public nature, *contra coronam et dignitatem suam;* and that makes the difference between the case of Woodward *v.* Fox, and the case of tithes, where private interest is concerned. 4. Those will be derelict lands, which go to the Crown, when there can be no owner found." 1 Strange Rep. 374.

If the acquisition of an estate tail by the Crown, before the statute 26 Hen. 8, in consequence of the attainder for treason of thet enant, did not destroy the estate, which appears to have been the case, from the passage in Brooke already stated,—why should the acquisition of an estate tail by the Crown, in consequence of the disability of the next heir in tail to inherit it, destroy the estate, and prevent its descent, upon the death of the person disabled, to the issue next inheritable under the entail? In the descent of estates in fee simple, the circumstance of the attainted person's surviving his ancestor is of the utmost importance. Thus Lord Hale says,—"If there be father and two sons, and the eldest is attainted in the life of the father, and dies without issue in the life of the father, the younger son shall inherit the father; for he need not mention his elder brother in the conveying of his title: but if the elder brother attaint survive the father but a day, and die without issue, the second son cannot inherit, but the land shall escheat, *pro defectu hæredis;* for the corruption of blood in the elder son, surviving the father, impedes the descent." As there is no corruption of blood in cases of entails, the time of the death of the person attainted is immaterial; for a title, or rather a pedigree, may be deduced through him, whether he died in the lifetime of the ancestor or not. And it is observable that Lord Hale confines the above case to descents of lands in fee simple. Tit. 29. c. 2. P. C. Vol. I. 356.

The doctrine contended for by the Attorney-General, that where the person attainted survives his ancestor, there is a forfeiture, is not to be found any where; and yet if the law were so, it is extremely probable that either Judge Jenkins, who has twice stated Lord Lumley's case, or some one of the barons of the exchequer, who in Dowtie's case fully discussed the statute

26 Hen. 8. would have mentioned so important a point. Lord Hale, in his Pleas of the Crown, professes to give a full account of the doctrine of forfeiture for high treason, to which he has dedicated a long chapter. He has twice stated Lord Lumley's case: but is totally silent as to the consequence of an attainted issue in tail surviving his ancestor. Is it probable that if he thought the circumstance of survivorship would create a forfeiture, he would have omitted to state it?

Ch. 28. Vol. I. 241. 356.

Serjeant Hawkins is equally silent on this head; nor is this doctrine mentioned by Mr. Yorke in his Considerations on the Law of Forfeiture, though Lord Lumley's case is there stated. These negative authorities must appear quite conclusive, when it is considered that they are fully supported by principle.

With respect to dignities, the principles of law that have been stated apply as directly to them, as to estates in land; for it would be extremely dangerous to admit of any distinction. It may therefore be laid down—

(1) That though an estate tail in a dignity is forfeited by the attainder for treason of the person actually having it, according to Nevil's case, yet that the attainder for treason of the eldest son of a tenant in tail of a dignity, in the litetime of his father, does not create a forfeiture of a dignity; because such eldest son had it not to forfeit.

(2) That if such eldest son survives his father, the dignity does not, as to any purpose, descend on him; because his attainder disables him from taking a dignity by descent, as effectually as it disables him from taking lands intailed, by descent.

(3) That, as no corruption of blood takes place in this case, a title, or rather a pedigree, may be deduced through such attainted son, after his decease.

In support of this proposition the case of the dukedom of Athol is stated; and it is said that the House of Lords in that case acted upon the principle that a dignity in tail may be claimed, *per formam doni*, under a limitation in letters patent, by a son surviving an attainted father, who never was tenant in tail in possession of such dignity; there being no corruption of blood in the succession to an estate tail, in lands or dignities.

Ante, p. 159.

(4) That during the life of such eldest son the dignity becomes vested in the Crown, or is suspended, or in abeyance,

but is not destroyed; and, therefore, that after the death of the eldest son, the next heir in tail becomes entitled to such dignity.

The case of Lord Bolingbroke is then stated; and it is said to be perfectly clear that the dignity created by the special limitation was a vested estate in Sir Henry St. John, descendible to the heirs male of his body; and would have descended, on his death in 1742, to his eldest son Henry, if he had not been attainted. The position of the Attorney-General that under the remainder to Sir Henry St. John and the heirs male of his body his eldest son and his issue male were excluded, is perfectly untenable; for it is impossible to contend, upon any principle of construction, that under a limitation to A. and the heirs male of his body, the eldest son of A. can be excluded from taking, by any estate already limited to such eldest son. If an authority were wanting in such a plain case, the following passage from Lord Coke is decisive,—"If a gift be made to the eldest son, and to the heirs of his body, the remainder to the father and the heirs of his body, the father dieth, the eldest son levieth a fine with proclamations, and dieth without issue, this shall bar the second son, for the remainder descended to the eldest." It follows that in consequence of the attainder of Lord Bolingbroke, the dignity which had been limited to Sir Henry St. John became upon his death suspended, or vested in the Crown during the life of Lord Bolingbroke; but upon his death it descended to his nephew; so that in this case, which it is presumed was fully considered, Lord Hardwicke being then Chancellor, and Sir Dudley Ryder Attorney-General, the House of Lords must have admitted that the circumstance of an attainted person's surviving his ancestor, from whom a dignity would have descended to him, as issue in tail, if not attainted, did not destroy the dignity, but only suspended it; and that on the death of the attainted person, it descended to the next issue inheritable to such dignity.

Ante, 157.

1 Inst. 272 a.

The following question was put to the Judges:—Whether, if lands were granted by the Crown to A. B. and the heirs male of his body lawfully begotten; and A. B. had issue a son named C. D., and C. D. had also a son named E. F.; and C. D. in the lifetime of his father committed high treason; and it was by act of parliament enacted that he should stand and be adjudged attainted of the said high treason to all intents and purposes

edly argued in the Exchequer Chamber, where it was resolved that the right of the estate tail was forfeited, because the feoffment could not operate as a discontinuance, the reversion always remaining in the Crown. The Attorney-General had contended that these decisions justified the *dictum* of Lord Hobart, that the statute 26 Hen. VIII., which creates a forfeiture of estates tail, is a remedial, and not a penal law. That where the reversion is in the Crown, the blood of the tenant in tail is corrupted: but where there is a remainder or reversion in a subject, the blood is not corrupted, because such a construction would operate to destroy the estate tail, and deprive the Crown of the forfeiture; for in that case the estate would go to the person in remainder or reversion.

This exposition of the statute was perfectly new. The first part of it rested solely on the authority of Lord Hobart: but it was observable that nothing similar to that *dictum* was elsewhere to be found. It was true that where a tenant in tail, with the immediate reversion in the Crown, was attainted of high treason, he forfeits his estate not only for his own life, but also during the existence of any issue of his body, because the issue are excluded by the saving. It does not, however, follow that his blood is corrupted; that would be directly contrary to all the resolutions on the statute. Lord Hobart's zeal for the Crown, and indignation against the traitor, by which he candidly acknowledges himself to have been moved in pronouncing that judgment, instigated him to go somewhat too far in advancing an extrajudicial opinion, not warranted by the authorities he cited, nor admitted by any subsequent writer. For neither Lord Hale nor Serjeant Hawkins, who have given very able expositions of this statute, and also of Walsingham's case, and that of Stone *v.* Newnham, have adopted, or even noticed, Lord Hobart's *dictum:* but have distinctly stated that in both the cases abovementioned the Crown acquired the estate by forfeiture.

Hob. R. 335.

Hale, P.C. Vol. 1. 242.
Hawk. B. 2. c. 49. s. 18 & 24.

The second part of the Attorney-General's exposition of the statute is equally unfounded; for where there is a remainder or reversion in a subject, the statute, as has been already stated, vests the estate in the Crown, during the life of the tenant in tail, under the enacting clause, and bars the issue, by excluding them from the benefit of the savings, so as to vest a base fee in the Crown, even if the blood were corrupted; for such cor-

ruption of blood would disable the issue in tail from inheriting, and the person in remainder could not take as long as there was issue of the tenant in tail; consequently the Crown would be entitled to hold the estate during that period.

But admitting the *dictum* of Lord Hobart to be good law, still it would not affect the present case, for it does not contravene the doctrine established ever since the statute 26 Hen. VIII. was made, and which will be stated hereafter, that a person must actually have an estate tail, to be capable of forfeiting it under that act; and here neither of the persons attainted ever had any estate in the dignity claimed; nor the doctrine established in Lord Lumley's case, that the attainder of the heir in tail is not attended with corruption of blood, *quoad* the estate tail.

The Attorney-General contended that if the presumptive heir, though attainted before the death of the tenant in possession, does in fact survive him, the estate is forfeited, because the statute 26 Hen. VIII. being made for the benefit of the Crown, and remedial, the words "or at any time after," are sufficiently extensive to cover all the cases of descent which occur, as well after the attainder, as between that period and the commission of the treason. To this argument a full answer may be given; for, first, a tenant in tail can only forfeit what he has; second, a person attainted cannot take an estate tail by descent, and consequently cannot have it to forfeit.

With respect to the first of these propositions the statute 26 Hen. VIII. has, down to the present time, been construed so strictly, that the tenant in tail must actually *have* the estate tail, in order to be capable of forfeiting it. Thus it has been decided that where a tenant in tail, with the reversion in a subject, made a feoffment in fee of his estate, and afterwards was attainted of treason, the feoffment operated as a discontinuance, and the offender not having the estate tail in him at the time of the attainder, there was no forfeiture.

Where the immediate reversion was in the Crown, there was no discontinuance of the estate tail; and therefore it was not forfeited, as has been already mentioned.

The principle of these decisions is, that a right of entry is forfeited to the Crown, under the statute 26 Henry VIII. but not a right of action. Now where the tenant in tail, with remainder to

whatsoever, and should suffer and forfeit as a person attainted of high treason by the laws of the land ought to suffer and forfeit, and A. B. afterwards died in the lifetime of C. D., and C. D. the attainted person then died, E. F. the son surviving, E. F. would be considered in the courts below, after the death of C. D., as entitled, under such grant, to the lands so granted?

Lord Chief Justice Gibbs delivered the opinion of the Judges as follows:—"We are of opinion that E. F. would not be considered in the courts of law, after the death of C. D. as entitled, under such grant, to the lands so granted.

"It has been contended on the part of those who have argued for the interests of E. F. that his interest in this case is protected by the statute *De Donis*, and is not within the peril of the 26 Hen. 8., and consequently is not forfeited to the Crown. But we are of opinion that it is not, under the circumstances stated to us, protected by the statute *De Donis:* and we are of opinion likewise, that if those who have argued for the claim of E. F. could persuade you Lordships to adopt the principle upon which they have endeavoured to bring it within the statute *De Donis*, they would by establishing that principle, bring it also within the operation of the 26 Hen. 8. and subject it to forfeiture, by the attainder of C. D.

"It is quite clear that if the case put to us had occurred upon an estate in fee simple conditional, before the statute *De Donis*, the land granted would have reverted to his Majesty, as upon a failure of issue described in the grant; for the tenant in tail dying while the next issue in tail stood attainted of high treason, such issue could not have taken, because his blood was corrupted by the attainder; and the reversion would fall to the Crown, for want of issue capable of inheriting under the grant. The King would then be in by way of reverter; and, being in by way of reverter, his title would be paramount to all charges upon the estate tail. This would have been the case before the statute *De Donis;* and we think that the statute has not altered it.

"The statute *De Donis* recites that donees in tail, after issue born, had been used to make alienations to the prejudice of the issue in tail, and also to the prejudice of the donor; and it enacts that such alienations shall not prejudice the issue, or the donor, or his heirs. This is all the statute does. I know that it has

received a very large construction for the protection of the issue in tail: I know that a criminal act done by a tenant in tail by which, upon attainder, he forfeits his estate, has been held to fall within the description of alienation, in the statute; and therefore it is that if a tenant in tail be attainted of high treason, and so the estate passes from him by forfeiture, the issue in tail is protected by the statute, as from an alienation by the tenant in tail; but that is not the present case. Here is nothing done by the tenant in tail either to alien, forfeit, or otherwise put away his estate; nothing which can possibly be brought within the term *alien* in the statute and therefore the case remains as at common law. The estate tail is extinguished, for want of issue capable of inheriting, on the death of the tenant in tail, and the land reverts to the King, who has the reversion in fee, the grant having originally proceeded from the Crown.

"It has been argued very strongly by the counsel for the claimant that corruption of blood, as far as it regards the succession to estates tail, is wholly taken away by the statute *De Donis;* and that this disability being removed, E. F. must of course be entitled to take, under the protection of the statute. Whether corruption of blood be or be not taken away must depend upon the language of the statute, and in some degree, upon the decided cases. Now, upon looking into the statute itself, I find not a word to support such a proposition. It protects the interest of the issue in tail in certain cases, and likewise the interests of the donor; and as far as such issue would have been prevented from taking before the statute, by corruption of blood, so far in those cases the effect of corruption of blood is taken away in their favour. Where protection is given to the issue by the terms of the statute, corruption of blood does not prevent its taking full effect; it is incidentally removed in those cases, but in no others, and the statute has no further operation in taking away corruption of blood. The question always is, whether the interest of the issue in tail be or be not protected by the terms of the statute; where it is not, corruption of blood remains, as it did before at the common law.

"This is a material view of the case, as it goes to the foundation of their argument. The tenure from the Crown would also furnish a decisive objection, if it were wanted, to the claim of E. F. There are many authorities to shew, (and this I believe

is the doctrine of all the Judges, in all cases in which the question has occurred,) that when land passes, as in the case put to us, by a grant of the Crown, in tail, with the reversion in the Crown, and the tenant in tail himself is attainted of high treason, the Crown is in of his reverter. That the estate tail is extinguished and at an end, and consequently the issue is not within the protection of the statute *De Donis*. So it has been held in all cases that have occurred where the tenant in tail is himself attainted.

"I am not aware that any case has occurred upon the attainder of the issue, on whom the inheritance would otherwise descend, which is the case before your Lordships. But the same reasoning applies with equal force, and I should say *a fortiori* to it.

"Now I will state shortly the cases to which I have alluded. First, there is a case in Dyer 115, in which this question presented itself in the most unfavourable view it could assume for the Crown. The tenant in tail made a lease, which was voidable, as against the issue in tail, but void as against the donor. The tenant in tail died; and the next issue in tail accepted rent from the lessee, and thereby confirmed the lease, which therefore stood good against him and his issue. The issue in tail afterwards committed high treason, and was attainted thereof, and the Attorney General filed an information of intrusion in the exchequer against the person who held under the lease; and the question to be decided was, whether the Crown took the estate, subject to the lease, or free from it. And the court, after long argument and much consideration, was of opinion that the Crown took the estate free from the lease; for they said, (I use nearly the words of Dyer,) "The intail is utterly extinct and determined, and then the King is seised of his ancient fee simple executed; of course he takes independent of the lease, which springs out of the estate tail, and must come to an end with it."

Cro. Eliz. 519. "There is another case of the Queen *v.* Hussey, and which I cite, not as containing a decision on the point, but a recognition of the same doctrine. That was the case of a tenant in tail holding from the Crown, and a re-grant by him to the Crown; and there a question arose upon the effect of the re-grant. And in the judgment upon that case, it is likened to the case of a tenant in tail, with a reversion in the Crown, committing high treason, and being attainted thereof, in which case the judges

say that the King would be in of his reverter. We have, therefore, first, the decision in Dyer, and then a recognition of the same doctrine in the case I have last stated. There is also a case in Lord Hobart of Sheffeild *v.* Ratcliffe, in which the effect of the two statutes was very much considered; and I know that much of the argument used by Lord Hobart upon that occasion has been treated as springing from an indignation against those who were accused of offences against the dignity of the Crown, mixed with a desire of enforcing the due forfeitures against them. But I cannot think that the opinion of so distinguished a judge is to be thus lightly put by. Lord Hobart considers this very point, whether corruption of blood was taken away by the statute *De Donis,* in all cases that regarded the succession to estates tail; and he denies that the statute has this general operation. He also puts the very case I am now arguing, namely, that of the attainder of a tenant in tail of the gift of the Crown, with the reversion in the Crown; and he agrees with the other authorities upon the subject, that in that case, the King would be in of his reverter, and by no other title; and, consequently, the estate tail would be destroyed. I may, therefore, state this as a strong authority upon both these points. P. 334.

"In addition to these authorities there is also, not a decided case, but the opinion of a very great man, whose name I need only mention to induce your Lordships to give it that regard which it deserves so well; I mean Lord Chief Baron Gilbert. Your Lordships know that the title Leases in Bacon's Abridgement was certainly of his composition; and it is stated as law under that title (letter D.) that if a tenant in tail, with the reversion in the Crown, makes a lease for years, and dies leaving a son, who accepts the rent, and has issue, and the son commits high treason, and is attainted, the estate tail is determined, and the King is in of his reverter; and all leases of the tenant in tail are determined, as if he were dead without issue. The author then considers the reasoning in the cases in which this point had been decided, without approving it altogether, but he adds, as the true ground of the decision, that where the Crown makes a grant in tail to a subject; the donee holds of the Crown by homage, fealty, and other services, as incident to his grant, and that the performance of those services forms the condition of his tenure. Vol. IV. 25. 5th Edit.

" Now there cannot be a grosser violation of the fealty which the donee owes to the donor, in the case of the King, than the offence of high treason; and when the donee has committed high treason, and is attainted of it, he has put an end to the estate tail, by the violation of that condition upon which he held it. And it is therefore that the King is in of his reverter; and that in a very hard case too, as the Lord Chief Baron put it, where a lease had been granted by the tenant in tail, which had been confirmed by the issue. But inasmuch as the Crown was in of its reverter, that lease which was granted out of the estate tail must fall with it. And then he puts the distinction between the case of the King, having the reversion, and being entitled to the remainder only. He says, if this had been an estate given to a tenant in tail, with remainder only to the King, and the tenant in tail had been attainted of high treason, the King would have taken the estate tail only, by forfeiture, subject to the lease; because he could take nothing but the estate the tenant in tail had; he must take it with all its incumbrances. The donee in that case owes no homage or fealty to the Crown; violates no condition to his donor, by the commission of high treason. But it is very different where the donee holds under the Crown as donor; for there, by the commission of high treason, he violates the most important condition on which he holds his estate.

" This reasoning falls in very much with the doctrine which is laid down by the judges, in their second resolution in Nevil's case, with respect to dignities. In the first they are said to have resolved that dignities might be intailed within the statute *De Donis;* by the second they resolved that if he who held a dignity was attainted of high treason, his estate therein would be forfeited, without the aid of the 26 Hen. 8. by force of a condition *tacitè* annexed to the estate; because he owes duties to the Crown in respect of it, which are grossly violated by the offence of high treason. Such forfeiture must therefore be at the common law; and your Lordships will see how strong an analogy this bears to the case of lands granted by the King in tail, with the reversion in the Crown. The estate in the land, like that in the dignity, subjects the possessor to certain duties, which form the condition of his tenure, and which he violates by

7 Rep. 33.

the commission of high treason, and both are forfeited and extinguished by his attainder; and in neither is the issue protected by the statute *De Donis.*

"For these reasons we think that in this case the interest of E. F. is not protected by the statute *De Donis.* But we have not been inattentive to the suggestion which fell from the highest authority, that supposing the argument to prevail, that corruption of blood is wholly taken away in regard to the succession to estates tail, by the statute *De Donis*, it would still be matter of consideration whether, under the circumstances which are stated in this case, the issue in tail would not take, though not for his own benefit, yet for the benefit of the Crown; and upon a full consideration of that subject, we see no objection, on that supposition, to his taking. A person attainted of high treason has capacity to take an estate, though not for his own benefit, yet for the benefit of the Crown. If the effect of corruption of blood be taken away, we see no reason why C. D. might not, after his attainder, succeed by inheritance, as he might take by feoffment, not for his own benefit, but for the benefit of the Crown.

"I have thought it right, in a question of so much importance, to explain the reasons of my opinion somewhat at large; and I believe my brothers concur with me in them. But we certainly all agree in thinking that in this case the interests of E. F. are not protected by the statute *De Donis;* and that if they were protected by that statute, upon the principle relied on, still they would fall within the 26 Hen. 8.

"There was one argument used at the bar which I have omitted to notice, namely, that by the 26 Hen. 8. nothing that came to an attainted person after his attainder would be forfeited. My lords, the words of the statute are, that he shall forfeit whatever he has, or whatever shall at any time come to him. It is insisted that this means only the time between the commission of the crime and the attainder: but we see no ground for putting so limited a construction on the act. The intention of the Legislature was to put estates tail upon the same footing as estates in fee simple, with regard to forfeiture; and a conveyance to an attainted person, ever so long after his attainder, would, I conceive, carry an estate to him, which he would be capable of taking for the benefit of the Crown.

"For these reasons we are of opinion that E. F. would take nothing."

The claim was not proceeded in.

Restitution of Blood.

56. In all cases where a person has been attainted of high treason by parliament, or by judgment on an indictment for high treason, petty treason, or felony, the corruption of blood can only be restored by parliament. Lord Hale says, restitutions by parliament are of two kinds; one, a restitution in blood only, which removes the corruption, but restores not the party attaint or his heirs to the manors or honours lost by the attainder, unless it specially extend to them; the other is a general restitution, not only in blood, but to the lands, &c. of the party attainted; that a restitution in blood may be special and qualified; but generally a restitution in blood is construed liberally and extensively.

P. C. c. 27. 3 Inst. c. 106.

57. In the case of the barony of Lumley, the petitioner's counsel produced an act of parliament made in 6 Edw. 6. upon the petition of John Lumley, eldest son and heir of George Lumley, son and heir apparent of John Lord Lumley, whereby, after a recital of the attainder of the said George Lumley, by reason whereof the said John Lumley stood, and was a person in his lineage and blood corrupted; and deprived of all degree, estate, name, fame, and of all other inheritance, that should or might by possibility have come to him by any other his collateral ancestors, on his said father's side, to whom he should or might have conveyed himself, as cousin and next heir of blood, by mesne degrees, by his said father. It was therefore enacted, that the said John Lumley and his heirs male of his body coming, might and should be accepted and called from thenceforth by the name of Lord Lumley; and that he and the heirs male of his body should have and enjoy, in and at all parliaments, and all other places, the room, name, place, and voice of a baron of the realm. And that the said John Lumley and his heirs, might be, and should be restored only in blood, as son and heir and heirs to the said George Lumley, and as cousin and heir and heirs of the said John Lord Lumley; and made only heir and heirs in blood as well to the said George, as to the said John Lord Lumley, and either of them, by the name of Lord Lumley.

Ante, s. 51.

It was contended on behalf of the Earl of Scarborough, who

opposed the claim, that the attainder of George Lumley was not reversed by this act, and that the restitution of the said John Lord Lumley in blood only, while the attainder remained unreversed, could not possibly revive the ancient barony, which was before extinct, and merged in the Crown by that attainder. That the construction of the act contended for would have this absurdity, that the same act must give the same barony, to the same person, under two different limitations, one in tail male, the other in fee simple, and both in possession; and was not therefore to be admitted.

The House of Lords appears to have been of this opinion, and to have rejected the claim on that ground.

58. Where a person is outlawed for high treason, petty treason, or felony, his blood is also corrupted: but it may be restored by act of parliament, or by a reversal of the judgment of outlawry, by writ of error. But a writ of error to reverse an outlawry in treason or felony is not *ex debito justitiæ*; and therefore can only be obtained by the favour of the Crown. 4 Burr. Rep. 2551.

59. The House of Lords resolved in 1702 that they would not in future receive any bill for reversing outlawries, or restitution in blood, that should not be first signed by her Majesty, or her successors, Kings or Queens of the realm, and sent by her or them to their house first, to be considered there. Journ. Vol. XVII. 119.

60. All titles of honour having been originally annexed to lands, it followed that no person could be a peer, without having an estate sufficient to support his dignity, which he could not alien without the consent of the Crown. A peer could, therefore, never be arrested for debt; the law presuming that he had sufficient lands and tenements in which he might be distrained. And there is one instance of a peer being degraded by parliament, on account of his poverty. A dignity might formerly be lost by poverty. 6 Rep. 52 b. 7——34 a.

61. By an act of parliament made in 17 Ed. 4., reciting that the King had erected and made George Nevil Duke of Bedford, and had purposed to have given him, for the sustentation of the of the same dignity, sufficient livelihood; and for the great offences, unkindness, and misbehavings that John Nevil (his father) had done and committed to his highness, as was openly known, he had no cause to depart any livelihood to the said George. And that it was openly known that the said George Nevil had not, nor by inheritance might have, any livelihood to Rot. Parl. Vol. VI. 173. 4 Inst. 355. 12 Rep. 107.

support the name, estate and dignity of Duke of Bedford: as oftentimes it was seen, that when any Lord was called to high estate, and had not livelihood convenient to support the same dignity, it induced great poverty and indigence, and oftentimes caused great extortion, embracery, and maintenance to be had, to the great trouble of all such countries where such estate should happen to be inhabited. Wherefore the King, by the advice of the lords spiritual, &c., ordained, that from thenceforth the said erection and making of the same duke, and all the names of dignity to the said George, or to John Nevil his father, should be from thenceforth void and of none effect.

Idem, 107.

1 Comm. 402.

62. Sir W. Blackstone has observed that Nevil's degradation is a singular instance; which serves, at the same time, by having happened, to shew the power of parliament; and by having happened but once, to shew how tender the parliament hath been in exercising so high a power.

Not within the Statutes of Limitation.

63. As a dignity cannot be aliened, surrendered, or extinguished by the person possessed of it, neither can it be lost by the negligence of any person entitled thereto, in not claiming it within a particular time. From which it follows, that dignities are not within the statutes of Limitation. This doctrine has been recognized by the House of Lords in a variety of cases, where claims to baronies, which had been dormant for centuries, have been received and admitted.

64. Even an adverse possession and exercise of a dignity by persons not entitled to it, for eighty-five years, will not bar the real owner.

Barony of Willoughby of Parham, printed cases.

65. Sir W. Willoughby, Knight, was, by letters patent, 1 Edward 6. created Lord Willoughby of Parham, to him and the heirs male of his body. He was succeeded by Charles, his only son, who left five sons; William, Sir Ambrose, Edward, Charles, and Sir Thomas. The issue male of William, the eldest son, enjoyed the dignity till the year 1680, when they failed. Thomas Willoughby, the heir male of the fifth son, was then admitted to sit in parliament, as Lord Willoughby of Parham, upon the supposition that there was no issue male of any of the other sons; and he and his issue male enjoyed the dignity till the year 1765, when they became extinct. In 1767, Henry Willoughby, who was the heir male of Sir Ambrose, the second son of the second Lord Willoughby of Parham, claimed the

dignity; and it was resolved by the House of Lords—" That the petitioner had a right to the title, dignity, and peerage of Willoughby of Parham, which was enjoyed from the year 1680 to the year 1765, by the male line, then extinct, of Sir Thomas Willoughby, youngest son of Charles Lord Willoughby of Parham, who were successively summoned to parliament by descent, in virtue of letters patent, 1 Edward 6. and sat as heirs male of the body of Sir William, created Lord Willoughby of Parham by the said letters patent, contrary to right and the truth of the case; it then appearing that Sir Ambrose Willoughby, the second son of the said Charles, and the elder brother of the said Sir Thomas who was averred to have died without issue, left a son, and that the claimant was great grandson and heir male of the body of such son, and consequently heir male of the body of the said Sir William, who was created Lord Willoughby of Parham; the male line of the eldest son of the said Charles Lord Willoughby of Parham having failed in or before the year 1680; and that the proof of the petitioner's pedigree being clear, the contrary possession ought to be no bar to his claim, as there was no person in being interested under such possession; without prejudice to the question, if there was. Journ. Vol. XXXI. 530. Idem, 537.

The claimant took his seat accordingly.

CHAP. III.

Descent of Dignities.

SECT. 1. *Descent of Dignities by Tenure.*
4. *Descent of Dignities by Writ.*
8. *The Half Blood may Inherit.*
12. *Abeyance of Dignities.*
18. *The Crown may terminate the Abeyance.*
24. *Modes of terminating an Abeyance.*
26. *Effect of a Writ to one of the heirs of a co-heir.*
28. *Cases of Claims to a Co-heirship.*
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SECT. 40. *Cases of Claims by a surviving heir.*
46. *Attainder of one of two Co-heirs does not determine the Abeyance.*
49. *Descent of Baronies created by Writs to the eldest sons of Peers.*
55. *Is the same as that of the Ancient Barony.*
58. *Descent of Dignities created by Letters Patent.*
63. *Cases of Claims to Dignities of this kind.*

SECTION I.

Descent of Dignities by Tenure.

DIGNITIES by tenure appear to have always been hereditary, and to have descended in the same manner as the castles or manors to which they were annexed. So that the descent of dignities of this kind, in the male line, was exactly similar to

Tit. 29. c. 3.

that of estates in land held in fee simple. And where the castles or manors to which the dignity was annexed were entailed, the dignity descended to the person entitled to such castle or manor,

Sup. ch. 1. s. 44, &c.

under the entail; as appears from the cases which have been already stated.

2. In ancient times the right of primogeniture appears to have taken place in the descent of dignities by tenure, to females, as

76 a. Brit. c. 72.

well as to males. For Bracton, in treating of the partition of estates among coparceners, says, that where a mansion or castle was *caput comitatus* or *baroniæ*, it was not divisible, *propter jus gladii quod dividi non potest;* for by such a division earldoms and baronies would be destroyed. *Per quod deficiat Regnum,*

quod ex comitatibus et baroniis dicitur esse constitutum. Now, as the eldest sister had a right to the principal mansion, *jure esneciæ,* to which, if it was *caput comitatus,* or *baroniæ,* the service of attending parliament appears to have been always annexed, she would, in those times, have been entitled to the dignity. And this was exactly conformable to the feudal law, in which an indivisible feud descended to the eldest daughter. Ante, c. 1.

3. The descent of earldoms and baronies in the reign of Edward I. appears, from the answers of the parliaments of England and Scotland, previous to the adjudication of the succession to the crown of Scotland, to have been to the eldest daughter. And Lord Coke has cited a charter of King Edward III. in which the right of the eldest sister to the earldom of Pembroke is fully recognized. Rym. Fœd. Vol. II. 583. 4 Inst. c. 40.

4. With respect to dignities by writ, whatever doubts existed formerly respecting their being hereditary, it appears to have been fully settled in the time of Lord Coke, that they were descendible to all the lineal heirs of the person first summoned. The right of primogeniture takes place among males; and, in default of males, they are descendible to female heirs, and transmissible by such female heirs to their descendants. Descent of dignities by writ.

5. This doctrine was admitted in the case of the barony of Grey of Ruthyn, in 1640; but was more fully considered, and solemnly established, in the following case:

6. In 1673, Catherine Lady O'Brien claimed the barony of Clifton of Leighton Bromswold; and her petition having been referred to the House of Lords, the Committee of Privileges reported—"That Jervas Lord Clifton was summoned by writ to parliament, 6 Jac. 1. by the title of Lord Clifton of Leighton Bromswold; so as the barony, being a fee simple, ought to descend from the said Lord Clifton upon his heirs; and that the Lady Catherine O'Brien being the heir, gradually and lineally descended from the said Lord Clifton, the barony did of right descend to her and her heirs." Barony of Clifton, Collins, 291.

It was ordered that the judges should give their opinion in this case; which they did in the following words:—

"The Lord Chief Justice of the King's Bench, Lord Chief Justice of the Common Pleas, Chief Baron Turner, Baron Littleton, Justice Atkins, Justice Ellis, and Baron Thurland, were Journ. Vol. XII. 629.

unanimous in opinions, that taking the case in fact to be as his Majesty's Attorney General reported it to be, and as it stood transmitted to that House, they found it to be thus, as to that lady's claim of the said barony. That Sir Jervas Clifton was summoned to parliament by the name of Jervas Clifton, of Leighton Bromswold, by writ dated 9 Ja. 1.; that accordingly he did come and sit in parliament as one of the peers of England; that he died 16 Ja. 1., leaving issue behind him, Catherine, his sole daughter and heir, who married to the Lord Aubigny, afterwards Duke of Lenox; that the said duke, 17 Ja. 1., was, by letters patent, created Baron Leighton, of Leighton Bromswold, in the county of Huntingdon, to him and the heirs male of his body, whereof none were then living; that the petitioner was lineally descended from him, and was his heir, (by the said report,) and as such then claimed the barony of Clifton. All which being admitted to be true, they were of opinion, first, that the said Jervas, by virtue of the said writ of summons, and his sitting in parliament accordingly, was a peer and baron of this kingdom, and his blood thereby ennobled; secondly, that his said honour descended from him to Catherine, his sole daughter and heir, and successively after several descents, to the petitioner, as lineal heir to the said Lord Clifton; thirdly, that therefore the petitioner was well entitled to the said dignity."

The House resolved, that the said Catherine Lady O'Brien had right to the barony of Clifton. (*a*)

7. The descent of dignities by writ is, in some respects, different from that of lands; for possession does not affect it, as every person claiming a dignity must make himself heir to the person first summoned; not, as in the case of lands, to the person last seised.

Tit. 29. c. 3.

The half blood may inherit.

8. In consequence of this principle, a brother of the half blood shall inherit a dignity, in preference to a sister of the whole blood. Thus, Lord Coke says, "Of dignities, whereof no other possession can be had but such as descend (as to be a duke, marquis, earl, viscount, or baron,) to a man and his heirs, there can be no possession of the brother, to make his sister inherit; but the younger brother being heir (as Littleton saith,)

1 Inst. 15 b.
3 Rep. 42 a.
Tit. 29. c. 3.

(*a*) The doctrine established in this case has been admitted in a great number of modern cases, which will be stated hereafter. *Note by Mr. Cruise.*

to the father, shall inherit the dignity inherent in the blood, as heir of him, that was first created noble."

9. Lord Hale, in a note to this passage, published by Mr. Hargrave, observes, that if it was a feudal title of honour, as the earldom of Arundel, or barony of Berkeley, there *possessio fratris* should hold well, because the title was annexed to land.

10. A question was moved in parliament in 16 Cha. 1. respecting the barony of Grey of Ruthyn, which was originally created by writ of summons. Lord Grey died, leaving a son and a daughter by one *venter*, and a second son by another *venter*. The barony descended to the eldest son, who sat in parliament, and afterwards died without issue. The question was, whether the second son should inherit the barony, or the sister; and the opinion of the judges was required; who resolved, that there was not any *possessio fratris* of a dignity, but it should go to the younger son, who was *hæres natus;* and the sister was only *hæres facta*, by the possession of her brother, of such things as were in demesne, but not of dignities; whereof there could not be an acquisition of the possession.

Cro. Car. 601. Collins, 195.

Journ. Vol. IV. 149. 8 Term R. 213.

11. In the case of the barony of Fitzwalter in 1668, the same objection was made before the privy council: and the question being put to the two Chief Justices, and Lord Chief Baron Hale; they all agreed that the half blood was no impediment to the descent of a dignity.

Collins, 286.

12. When dignities by writ were first introduced, they were probably descendible, in default of males, to the eldest female; in conformity to the rule then existing respecting the descent of baronies by tenure. But in course of time it became established, that where a person possessed of a dignity by writ died, leaving only daughters or sisters; as the dignity was of an impartible nature, it fell into a dormant state, and was said to be in suspence or abeyance.

Abeyance of dignities.

13. Lord Coke has stated a case in 23 Hen. 3. in these words:—"Note, if the earldom of Chester descend to coparceners, it shall be divided between them, as well as other lands. And the eldest shall not have this seigniory and earldom to herself, entire, *quod nota*. Adjudged *per totam curiam.*" And he makes the following observations on this case:—"By this it appeareth that the earldom (that is, the possessions of the earldom,) shall be divided; and that where there be more daughters than

1 Inst. 165 a. Fitz. Ab. Tit. Partition, 18.

one, the eldest shall not have the dignity and power of the earl; that is, to be a countess. What then shall become of the dignity? The answer is, that in that case, the King, who is sovereign of honour and dignity, may, for the uncertainty, confer the dignity upon which of the daughters he please; and this hath been the usage since the Conquest; as is said."

Bar. Vol. I. 44. Collins 99.

14. The above observations of Lord Coke do not seem to be well founded; for it appears from Dugdale, that Ranulph Earl of Chester died in 16 Hen. 3. without issue, leaving four sisters, of whom the eldest, Maud, was married to David Earl of Huntingdon, brother to William King of Scotland, by whom she had a son John, surnamed Scotus, who succeeded Ranulph in the earldom of Chester; but the reason was, that in the partition of the vast possessions of Ranulph, this John had for his part, his mother being dead, the whole county of Chester.

15. The decision cited by Lord Coke must have taken place on the death of the above named John in 1237, according to M. Paris, leaving four sisters: but it cannot be relied on as an authority; for it appears from Knyghton, c. 35., that this was a special and arbitrary exertion of the prerogative, by which the King, probably from jealousy of the great powers and regalities of the Earls of Chester, continuing in the presumptive heir to the crown of Scotland, not only took the dignity of the earldom into his own hands, but also all the lands appertaining to it; making compensation to the four sisters of the last earl, in other lands.

Dugd. Bar. Vol. II. 245.

16. It appears to have been held, so late as in the reign of Henry VI., that the eldest daughter had a superior claim to that of her sisters, to the dignity of their ancestor. But whatever might have been the old law, the doctrine laid down by Lord Coke was fully established in his time; and it was soon after resolved by the judges and the House of Lords, that where a dignity is descendible to heirs general, and the person possessed of it dies, leaving only daughters or sisters, or co-heirs, it falls into abeyance, or rather becomes vested in the Crown, during the continuance of the co-heirship.

Collins, 175. Journ. Vol. III. 535. See Nich. Rep. of L'Isle Peerage Case, App. 394.

17. Thus in the case of the earldom of Oxford, a report was made to the House of Lords by Lord Chief Justice Crewe, that he, with the Lord Chief Baron, Justices Doderidge, Yelverton, and Baron Trevor, had considered the titles of the competitors

to the baronies of Bulbeck, Sandford, and Badlesmere; and they certified that the same baronies descended to the general heirs of John, the fourth Earl of Oxford, who had issue, John, the fifth Earl of Oxford, and three daughters, one of them married to the Lord Latimer, another to Wingfield, and another to Knightley; which John, the fifth Earl of Oxford, dying without issue, those baronies descended upon the daughters, as his sisters and heirs; but these dignities being entire and not dividable, they became incapable of the same, otherwise than by gift from the Crown; and they in strictness of law reverted to and were in the disposition of King Henry VIII.

The House of Lords certified to the King, that for the baronies, they were wholly in his Majesty's hand, to dispose of at his pleasure.

18. The expression that baronies in abeyance are wholly in the disposal of the Crown, is too general; for it is not in the power of the King to dispose of such baronies to a stranger. The Crown has only the prerogative of terminating the abeyance or suspension of a dignity, by nominating any one of the coheirs to it: and such nomination operates, not as a new creation of a barony, but as a revival of the ancient one. For the nominee becomes entitled to the place and precedence of the ancient barony to which he is nominated.

The Crown may terminate the abeyance.

19. This prerogative does not however appear to have been of ancient date; for though Lord Coke, in the passage above cited, respecting the earldom of Chester, carries it up to the Conquest, *as was said;* yet in his Reports he says, Camden told him, *some* held, that if a baron died having issue divers daughters, the King might confer the dignity on him who married any of them; as had been done in divers cases, *viz.* in the case of Lord Cromwell, who had issue divers daughters, and King Henry VI. conferred the dignity upon Bourchier, who married the youngest daughter; and he was called Lord Cromwell. The Crown has, however, exercised this prerogative in so many subsequent instances, that it cannot now be questioned.

12 Rep. 112.

20. Robert Devereux, Earl of Essex, Viscount Hereford, and Lord Ferrers of Chartley, a barony descendible to heirs general, died without issue in 1646, leaving his two sisters his coheirs. In 1678 Sir Robert Shirley, grandson of Lady Frances, one of the sisters and coheirs of the said Earl of Essex, was summoned

Journ. Vol. XIII. 130.

to parliament, by writ, directed to Robert Shirley de Ferrers, Chevalier. It was opened to the House by the Lord Chancellor, how his lordship came in upon descent, so no introduction to be; and he was placed upon the baron's bench, next below Lord Berkeley.

18 March, Journ.

21. In 1720 a writ of summons was issued to Hugh Fortescue, by the title of Hugh Fortescue de Clinton, Chevalier. When he took his seat, the Lord Chancellor explained to the House his descent; how he was one of the heirs of Theophilus late Earl of Lincoln, and Baron Clinton, which barony was then in abeyance between Mr. Fortescue and Samuel Rolle, Esq.

Journ. Vol. XXX. 403.

22. In 1763 a writ of summons was issued to Sir Francis Dashwood, Baronet, by the title of Lord Le Despencer; the Lord Chancellor informing the House of Lords that he was one of the heirs of Lady Mary Fane, in favour of whom and whose heirs King James I. had revived the ancient barony of Le Despencer. Thereupon he was allowed to take his seat upon the upper part of the bench, next above Lord Abergavenny.

23. The barony of Willoughby de Eresby fell into abeyance in the year 1779, by the death of Robert Bertie, Duke of Ancaster, without issue, leaving Lady Priscilla Barbara Elizabeth, and Lady Georgiana Charlotte, his sisters and coheirs. In the following year his Majesty confirmed that barony to Lady Priscilla Barbara Elizabeth, then the wife of Peter Burrell, Esq. since created Lord Gwydir.

Modes of terminating an abeyance.

24. When the King terminates the abeyance of a barony in favour of a commoner, he directs a writ of summons to be issued to him, by the style and title of the barony which is in abeyance; as in the cases of Lord Ferrers and Lord Le Despencer. Where the person in whose favour an abeyance is determined is already a peer, and has a higher dignity, there the King confirms the barony to him by letters patent: and in the case of a female, the abeyance is also terminated by letters patent.

25. Formerly it was the practice to confirm the barony to the coheir and his or her heirs; but now it is more properly to the heirs of his or her body: for no one can be heir of the body of the person in whose favour the abeyance is terminated, without being also lineally descended from the person first summoned.

Effect of a writ to one of the heirs of a coheir.

26. Where the abeyance of a barony is terminated by a writ of summons, different opinions have been entertained respecting

the extent of the operation of such a writ. Some eminent persons are said to have held, that where a barony is in abeyance between the descendants of two coheirs, and the King issues his writ of summons to one of the heirs of the body of one of the two heirs, the abeyance is thereby terminated, not only as to the person summoned, and the heirs of his or her body, but also as to all the heirs of the body of such original coheir. But the better opinion seems to be, that the effect of a writ of summons, in a case of this kind, is only to terminate the abeyance, as to the person summoned, and the heirs of his or her body; and that upon failure of heirs of the body of the person so summoned, the barony will again fall into abeyance, between the remaining heir or heirs of the body of the original coheir, one of whose heirs was so summoned, if any, and the heir or heirs of the body of the other coheir.

27. This latter opinion is founded upon a principle of law, that possession does not affect the descent of a dignity; and that a writ of summons to parliament by an ancient title (as the summons of the eldest son of a peer, in the lifetime of his father, by the name of an ancient barony then vested in the father,) will not operate, so as to give any title by descent, collateral or lineal, different from the course of descent of the ancient barony; and that he who claims a dignity must make himself heir to the person on whom the dignity was originally conferred; not to the person who last enjoyed it.

Vide Barony of Sydney, infra.

28. In consequence of the practice of terminating an abeyance, several claims have lately been made to a coheirship in a barony: but the King has seldom terminated the abeyance in favour of one of the coheirs, without first referring the case to the House of Lords, in order to satisfy himself of the existence of the barony, and who the persons were between whom it was in abeyance.

Cases of claims to a coheirship.

29. In the year 1764, Norborne Berkeley petitioned the King to be nominated to the ancient barony of Botetourt, created by writ in 33 Edw. 1. directed to John Botetourt. This petition having been referred to the House of Lords, it was there resolved that the barony of Botetourt was in abeyance; and that the petitioner was one of the coheirs of John Lord Botetourt.

Barony of Botetourt, printed case, Nicholas's L'Isle Peerage Case, Appendix II. p. 309. Journ. Vol. XXX. 561.

A writ of summons was soon after directed to Mr. Berkeley, by the name of Norborne de Botetourt, Chevalier, who took his

seat accordingly [on the barons' bench next after Lord Dacre, on the 13th April 1764, and died in 1776 without issue, when the barony again fell into abeyance among the coheirs of John Lord Botetourt, who died in 9 Rich. II. On the 4th June 1803, his Majesty Geo. III. was pleased to determine the abeyance in favour of Henry fifth Duke of Beaufort, son and heir of Elizabeth who died in 1799, sister and heiress of Norborne the last Lord Botetourt, by Charles Noel, fourth Duke of Beaufort; and it devolved, on his Grace's death in 1803, on Henry Charles the present Duke of Beaufort and Baron Botetourt.]

Barony of Howard of Walden, printed case.

30. In 1784, Sir John Griffin Griffin petitioned his Majesty to be nominated to the barony of Howard of Walden, created by writ of summons in 39 Eliz. directed to Lord Thomas Howard, second son of the Duke of Norfolk, the petitioner being one of the coheirs of the said Lord Thomas Howard.

The House of Lords resolved that the barony of Howard of Walden was in abeyance, and that the petitioner was one of the coheirs of James the then last Lord Howard of Walden. Soon after which Sir John Griffin Griffin was summoned to parliament by writ, as Lord Howard of Walden.

Barony of Roos. Printed case. L'Isle Peerage case. Appendix, 391. 400.

31. Lady Henry Fitzgerald petitioned his Majesty in 1805 to be nominated to the barony of Roos, as one of the coheirs of Robert de Ros or Roos, who was summoned to parliament in 49 Henry 3. The House of Lords resolved that Sir Thomas Windsor Hunloke, George Earl of Essex, and the petitioner, were the coheirs of Robert de Ros; and that the barony which was vested in the said Robert de Ros remained in abeyance between the said Sir T. W. Hunloke, George Earl of Essex, and Lady Henry Fitzgerald: soon after which his Majesty confirmed the barony to Lady Henry Fitzgerald.

Barony of Zouch. Printed case.

32. In 1807, Sir Cecil Bishop petitioned the King to be nominated to the barony of Zouch of Harringworth, it being a barony by writ, as appeared from several writs of summons of a date anterior to the 11 Rich. 2. in which year it was well known that the first instance of creating a baron by patent took place.

24th April, 1807.

The House of Lords resolved that the barony of Zouch of Harringworth was a barony created by writ in the reign of King Edward II. and therefore descendible to heirs general; and that the said barony fell into abeyance, upon the death of Edward the last Lord Zouch, between Zouch Tate his grandson, being the

son and heir of Elizabeth his eldest daughter, and Mary, wife of William Connard, Esq. his youngest daughter, which said Elizabeth and Mary were the only daughters of the said lord. That the petitioner and certain other persons were the coheirs of the said last Lord Zouch, together with the heir or heirs of the body of the said Mary, the youngest daughter of the said last Lord Zouch: if the said Mary had any heir or heirs of her body then in existence; and if she had left none, such were the sole coheirs of the said last Lord Zouch. That the said barony was in abeyance among the said coheirs, and consequently was at his Majesty's disposal. (*a*)

Where only one heir, the abeyance terminates.

33. In all cases of abeyance of dignities, whenever the coheirship determines by the death of all the daughters or sisters but one, or by the extinction of all the descendants of such daughters or sisters but one, by which there remains only one heir to the dignity, the abeyance is terminated, and the person who is the sole heir becomes entitled to the dignity. For although it was held by some, that in the case of the earldom of Oxford, the Judges had given their opinions that by the descent of a barony upon coheirs, it became so completely vested in the Crown, that no person could afterwards acquire a right to it, without a grant from the Crown; yet it was soon after settled, that where the coheirship ceased, and there remained only one heir, such sole heir became entitled to it, as a matter of right, and not of favour, from the Crown.

Ante s. 17.

Barony of Ogle, Dugd. Bar. Vol. II. 363.

34. Sir Robert Ogle was summoned to parliament 4 Edw. 4. and the title descended to Cuthbert Ogle, who was summoned to parliament 5 Eliz. and died in 39 Eliz. leaving two daughters his heirs—Joan, married to Edward Talbot, a younger brother to the Earl of Shrewsbury, who died without issue; and Catherine, married to Sir Charles Cavendish, of Welbeck. Catherine having survived her sister, and being sole heir to the barony of Ogle, obtained special letters patent, 4 Car. I. declaring her to be Baroness Ogle of Ogle, in the county of Northumberland, to her and her heirs for ever; a copy of which is given by Collins.

P. 412.

35. In this case the confirmation might have been a matter of favour; and, indeed, an opinion seems to have prevailed during

(*a*) Sir Cecil Bishop has been summoned to this barony.—*Note by Mr. Cruise.*

the reign of King Charles II. that where a dignity fell into abeyance, it was in the power of the Crown to extinguish it. This appears from the letters patent by which the barony of Lucas of Crudwell was granted to the Countess of Kent; in which there is a proviso, " That if there shall be more persons than one, who shall be coheirs of her body by the said Earl of Kent, whereby the King's Majesty, his heirs or successors, might declare which of them he pleases to have and enjoy the said honour, title, and dignity, or might hold the same in suspense, *or extinguish the same*, at his and their pleasures; that nevertheless the said honour, title, and dignity, shall not be held in suspense, or extinguished, but shall go to and be held and enjoyed," &c.

36. But the doctrine, that where a dignity fell into abeyance, it might be extinguished by the Crown, appears to have been fully disproved in the following case; in which it was determined by the House of Lords, after great deliberation, and assented to by the Crown, that where a dignity falls into abeyance between coheirs, whenever there is a determination of the coheirship, by the death of all the coheirs except one, such one heir becomes entitled to the dignity, as a matter of right.

Barony of Clifford, Collins, 306. S. P.

37. In 1694, Sir Richard Verney, Knight, claimed the barony of Broke, as lineal heir to Sir Robert Willoughby, who was summoned to parliament 7 Henry 7. the writ being directed, *Roberto Willoughby de Broke, Chevalier*; to whom succeeded Sir Robert Willoughby, who was summoned to parliament by the same title, and sat accordingly, *temp.* Henry VIII. From him the barony descended to Lady Elizabeth Greville (she having survived her two sisters, who died without issue), from whom it descended to her grandchild and heir, Sir Foulk Greville, Knight (who was created Lord Broke, to him and his heirs male); but who dying without issue, the barony descended to Margaret Lady Verney, the petitioner's grandmother.

Barony of Willoughby de Broke. Coll. 322. Skin. Rep.

The Attorney-General argued against this claim, 1st. that a summons by writ did not create an estate in fee; for that anciently several had been so summoned, and yet their sons had never been summoned after them: nay, sometimes the very person first summoned had afterwards been omitted to be summoned. But he did not design to urge that any farther: but chiefly insisted, that even in the time of King Henry VII. when Sir

Robert Willoughby was first summoned, it was not considered as an estate in fee; urging Latimer's case, and, of later times, Abergavenny's case, and Paget's. 2d. That if it did descend, it was extinguished in the coheirs of Lady Margaret Greville; urging the Earl of Oxford's case.

The counsel for the petitioner replied, that, as to the baronies of Latimer and Abergavenny, those honours followed the entail of the lands, as baronies by tenure. As to the resolutions in the Earl of Oxford's case, touching the baronies of Bulbeck, Sandford, and Badlesmere, that they were in his Majesty's disposition; they allowed that the King might dispose of them to which of the coheirs he pleased, during the coparcenership; but not to a stranger, nor to the heir male collateral, who had no right thereto, so long as there were heirs general.

The House of Lords resolved, that the petitioner had no right to a summons to parliament.

A committee was appointed to draw up a report to the King pursuant to the said resolution, since the chief reason for rejecting the said claim seemed to be, that the said barony was for some time lodged in coheirs; and that therefore it was in his Majesty's power to hold the same in suspense or abeyance, or to extinguish the same.

38. The committee was adjourned before any report was made. But in the interim several peers, as the Earls of Lindsey, Thanet, Sussex, and Abingdon, the Lord Delawarre, &c. who had baronies by writ in them (some whereof had at that time only daughters), looking upon themselves concerned from what was mentioned at the committee in relation to the descent of such baronies on coheirs, moved the house that a day might be appointed to consider of what had been mentioned by some lords on that day in relation to the descent of baronies by writ: and a day was appointed accordingly. In pursuance whereof the lords who interested themselves therein were heard by their counsel, Mr. Finch and Sir Thomas Powis; and it was then ordered, that the King's Attorney-General should be likewise heard touching the said matter. Journ. Vol. XV. 442. 458. 552.

The Attorney-General argued for the King against the descent of baronies by writ; and the counsel for the Lords replied, and produced precedents, which being collected by Mr. King, Lancaster herald, were printed on that occasion.

This printed paper is intituled, "Baronies by writ devolving upon coheirs, enjoyed by, or conferred upon, the person or issue of the surviving coheir, where such person or issue become sole heir to the barony." It contains the cases of Lord St. John of Basing, Lord St. Amand, Lord Roos, Lord Bardolph, Lord Coniers, Vipount Lord of Westmerland, Lord Ogle, and Lord Clifford; and concludes with the following observations:—"If a barony in fee once suspended, or put in abeyance, by falling upon coheirs, cannot be taken up again without some instrument from the King to revive it, then if a baron in fee should die leaving two daughters, and a brother, though one of the daughters should die ever so soon after the death of her father, yet the other daughter could not have the title, but at the King's pleasure. And if both the daughters should die without issue, their father's brother will not be a peer, but at the pleasure of the King: nay, if such a baron should die leaving two daughters and his widow with child of a son, upon the death of such baron, the title will be suspended till the son is born; and according to this rule the son will not be a baron, but at the King's pleasure, because the title was once suspended.

"The suspension in case of coheirs doth not arise from any incapacity either in the blood, or in the persons, of the coheirs: but only because both cannot take the barony at once. And neither of them in law is preferred before the other: therefore of necessity the title in such a case remains in abeyance or suspense, until it be either fixed in one by the King, whilst there are several coheirs in being, or else until it is fixed in one by the law, upon her or her issue's becoming the survivor; for when the only reason for suspension is removed, the survivor hath the same right as if she at first had been the sole heir. The contrary opinion to this doth tend to the extinguishment of titles of honour, in such cases as may and will frequently happen; and according to this it may often be in the King's pleasure to exclude the male descendants of barons in fee from sitting in parliament, if in the elder brother's line the title of honour should be ever suspended for the shortest time, by more than one daughter."

The House ordered that the heralds should be heard as to the said precedents, who were accordingly heard at the bar, in rela-

tion to the descent of baronies by writ. And Sir Thomas St. George, garter, made several objections to the said printed precedents; upon which Mr. King was called to prove the same, who justified them by the books and records of the heralds' office. An authentic copy of the King's recognition of the barony of Ogle in 4 Cha. I. being read at the bar; and the matter being reported by the lord keeper; the question was put, "Whether if a person summoned to parliament by writ, and sitting, die, leaving issue two or more daughters, who all die, one of them only leaving issue, such issue has a right to demand a summons to parliament;"—and it was resolved in the affirmative. Journ. Vol. XV. 522.

39. The principal objection, touching the extinguishment of the barony of Broke, by reason of its descending to coheirs, being removed, Sir Richard Verney claimed the barony of Willoughby de Broke, as the sole heir of Sir Robert Willoughby de Broke. Journ. Vol. XV. 634. 643. 671.

Sir Thomas Powis, as his counsel, read a list of those peers who had baronies by writ in them, included under higher titles; and also a list of those lords who then sat in the House by virtue only of original writs of summons, and by descent from baronies in fee; and a list of several noble ladies, who had then such baronies in them, some of whom had been declared baronesses in parliament: and insinuated to the Lords, that while he was arguing one peer into the House, the King's counsel were arguing several noble dukes and earls out of their baronies, and several sitting barons out of the House. For, if a summons by writ was not an estate in fee, and descendible, then might the King choose whether he would summon those barons any more to parliament, after the conclusion of the present parliament; and so by that means would subject the peerage to great uncertainties, and destroy all their resolutions and judgments touching the descent of such baronies.

The King's counsel urged several instances of ancient times against the descent of such baronies, and argued against the operation of the writ; and that in this case it did not appear but that the first foundation of the honour might have been by patent, or for life, or in tail male; and vouched Bromflete's case. He farther insisted, that the descent of the barony to coheirs did merge or extinguish it, or make it revert to the Crown; and that Ante, c. 1.

it was in abeyance, by which means it was left to the clutches of the law, so as not to be taken out from thence, by any person whatsoever, otherwise than by a new creation.

The petitioner's counsel replied, that the honour could not be by patent, nor by writ, with a limitation to the heirs male: for that there was issue male from each of the two Sir Robert Willoughbys, who yet were not barons; insisting upon the right of the peerage in general; and that, upon the true construction, the title was Willoughby of Broke.

After long debate, it was resolved that Sir Richard Verney had a right to a writ of summons to parliament, by the title of Lord Willoughby of Broke.

A writ of summons was accordingly issued to him; and he was seated in the House of Peers by descent, without ceremony, in the ancient place of his ancestor Sir Robert Willoughby, next above Lord Eure.

Journ. Vol. XV. 668.

Cases of claims by a surviving heir.

40. Since this determination, several claims have been made to baronies which had been in abeyance, upon the ground that the abeyance was determined: and that the claimant was, by the failure of heirs of the other coheirs, become the sole heir to the barony.

Barony of Berners, Journ. Vol. XXI. 266. 339. Collins, 331.

41. Catherine Bokenham claimed, in 1717, the barony of Berners, which had fallen into abeyance, as sole heir of Sir John Bourchier, Lord Berners, the abeyance being then terminated.

The petition was referred by his Majesty to the House of Lords. Lord Clarendon reported from the Committee of Privileges, that search had been made so far back as the reign of Edward III., whether any patent had been granted for creating Sir John Bourchier a baron, but none could be found: that there was produced a writ of summons to parliament in 33 Hen. 6., directed *Johanni Bourchier de Berners*, along with several other writs directed to him, and also several writs directed to his grandson and heir.

That the committee had inspected the Journals of the House in the reign of Henry VIII., and found the name of Lord Berners entered therein as present several days.

That it appeared to the committee that the petitioner was (by the death of her brothers and sisters without issue) become sole

heir of Sir John Bourchier, knight, first Lord Berners, and was lineally descended from him.

The House resolved that the said Catherine Bokenham had a right to the said barony of Berners.

42. In 1794, Mr. Trefusis claimed the barony of Clinton, as sole heir to Edward Lord Clinton, who was seised of the said barony in 4 & 5 Phil. and Mary, which had fallen into abeyance in 1692, between Lady Catherine Booth, Lady Arabella Rolle, and Lady Margaret Boscawen; that in 1717 the line of Lady Catherine Booth failed; that in 1720 the King had terminated the abeyance between the heirs of Lady Arabella Rolle and Lady Margaret Boscawen by granting a writ of summons to Mr. Fortescue, the heir of Lady Margaret Boscawen; and that by the extinction of the line of Lady Margaret Boscawen, the abeyance determined, and Mr. Trefusis, who was the sole heir of Lady Arabella Rolle, became entitled to the barony.

Barony of Clinton. Printed case.

Ante, s. 21.

The House resolved that the petitioner had made out his claim to the title, honour and dignity of Baron Clinton; and a writ of summons was issued to him accordingly.

20th February, 1794.

43. In 1798, the Marquis of Carmarthen claimed the barony of Conyers, created by writ of summons to William Conyers in 1 Hen. 8. which had fallen into abeyance in 1557, by the death of John Lord Conyers, leaving three daughters and no issue male: but the abeyance terminated in 1664, by the extinction of the line of two of the daughters; and Conyers D'Arcy, the heir of the third daughter, took his seat in the House of Lords as Lord Conyers, to whom the petitioner was sole heir.

Barony of Conyers. Printed case.

The House of Lords resolved that the petitioner had made out his claim to the title, honour, and dignity, of Baron Conyers.

44. Sir John Griffin Griffin, in whose favour the abeyance of the barony of Howard of Walden was terminated in 1784, having died without issue: and there being a complete failure of heirs of the coheir under whom he derived; the barony was claimed in 1807 by C. A. Ellis, an infant, as the sole heir of the other coheir, being the heir of the last Earl of Bristol. The Committee of Privileges resolved that the petitioner had made out his claim.

Barony of Howard of Walden. Printed case, 1807. Ante, s. 30.

45. Francis Earl Moira claimed in 1809 the barony of Hastings, stating that he was the sole heir general of William the

first baron of Hastings, who was called to parliament by writ of summons in 1 Edw. 4.; and the Attorney-General (Sir V. Gibbs) having reported in his favour, he had a writ of summons by that title, and was seated accordingly.

Attainder of one of two co-heirs does not determine the abeyance.

46. It has been held by the House of Lords, in a modern case, that where a barony was in abeyance between two persons, the attainder of one of them for high treason did not terminate the abeyance, and give to the other a right to the barony.

Barony of Beaumont. Printed case. See also Nich. L'Isle Peerage case, note, p. 93.

47. Thomas Stapleton, of Carleton, in the county of York, Esq. claimed the barony of Beaumont; and stated, that Henry de Beaumont was summoned to parliament in the second, third, fourth, and several other years of the reign of Edward II., and sat in parliament. That the barony of Beaumont descended to William Lord Beaumont, who died 24 Hen. 7. without children, leaving an only sister Joan. That the said Joan married John Lord Lovell; and had issue a son who died without issue, and two daughters: Joan, who married Sir Bryan Stapleton, to whom the claimant was heir at law; and Frideswide, who married Sir Edward Norris. That Frideswide had two sons, Sir John Norris, who died without issue; and Henry Norris, who was attainted of high treason in 27 Hen. 8., and from whom the Earl of Abingdon was lineally descended, and was his heir. That, upon the death of Sir John Norris without issue, the abeyance in the barony of Beaumont ceased; and the whole right and claim to the same vested in the heirs of Joan the eldest sister. That the petitioner was the heir general of Henry de Beaumont, who was first summoned to parliament; and therefore apprehended, and was advised that he had a legal claim to the said barony.

This petition was referred to the Attorney-General (Sir John Scott), who reported—"That an important question arose, whether by the attainder of Henry Norris, the abeyance was determined, and the heirs of the eldest sister exclusively entitled by descent to the barony of Beaumont, by reason of the incapacity of Henry Norris's heirs thereby created, to claim through him. Upon this point he humbly certified to his Majesty, that he had not been able to find any satisfactory determination; and, inasmuch as this point materially affected his Majesty's royal prerogative, and the principles of law, with respect to the descent of honours and dignities, he humbly presumed to submit to his Majesty, that, before any act was done pursuant

to the prayer of the petition, it might be fitting to refer the whole matter of the petition to the House of Peers."

The petition having been referred accordingly, it was contended by Mr. Stapleton's counsel, that the coheirship was dedetermined by the attainder; and that the case of Charleton Lord Powis was in point.

In that case, Lord Powis died seised of the barony of Powis, which was created by writ, leaving two daughters; Joan married to Sir John Grey, and Joyce married to Lord Tiptoft. Joyce left issue a son, John Lord Tiptoft, who was created Earl of Worcester, and was attainted of high treason, and executed 10 Edw. IV. Joan had issue a son Henry, who left issue a son Richard, who left issue a son John. Neither Henry nor Richard were ever summoned to parliament: but John, who was ten years old when the Earl of Worcester was attainted, was summoned to parliament 22 Edw. 4., by the title of John de Grey de Powis. And, in this case, it could not be said that John de Grey had the barony by favour of the Crown; because he was summoned to the first parliament which was holden after the attainder of the Earl of Worcester, and his attaining his age of twenty-one years; when it could not be supposed he had done any service to his King and country, to merit such a favour. Collins, 398.

The Lords referred a question of law to the Judges, *viz.* "Whether, supposing the claimant to have proved himself one of the coheirs of the body of Henry de Beaumont; and supposing a barony to have been created in the said Henry and the heirs of his body, the claimant was then entitled of right to such barony, according to the state of the pedigree last delivered in on his part."

On the 25th day of June 1795, the Lord Chief Justice of the Common Pleas (Eyre) delivered the following opinion of the judges on this point, after stating the question in the precise form in which it appears above. (*a*)

"My Lords, the Attorney-General, on the part of the Crown, summed up his objections to the claim in a very few words. He said, he opposed the claim on this single point, that the claimant Mr. Stapleton was not the heir of Henry de Beaumont;

(*a*) From a manuscript in his own handwriting, for the use of which I am indebted to the kindness of Sir Thomas Plumer, M. R. *Note by Mr. Cruise.*

that it was not enough that he might be a part, a moiety for instance, of the heir; that he must have the complete character in him. Your Lordships' question supposes Mr. Stapleton to have sufficiently made out his pedigree, and that he is to be taken to be one of the coheirs.

" Coheirs derive to themselves title to the inheritance of their ancestor by descent; they are heirs to the ancestor. Our books, in particular Sir Edward Coke's comment on Littleton, section of Coparceners, point out the manner in which they claim. They are altogether *unus hæres, unum corpus;* their heirship is *unitas juris;* the whole body of the coheirs, however numerous, must unite to constitute the heir.

" To illustrate this doctrine, Sir Edward Coke puts the case of the inheritance of coheirs, sued for in our courts; he says, they must all join in a *præcipe,* for they all make but one heir. He puts another case of coheirs, claiming to take under a limitation to the right heirs of A.; and he states the law to be, that one of the coheirs standing alone cannot take any thing, for he is not the right heir of A. The case, as he puts it, is a particular one; and, in its circumstances, approaches towards the case now under consideration. But I choose to disentangle it, in this part of the argument, of those circumstances; and state it simply as an authority, that one coheir does not come within the description of heir, and cannot claim as heir.

" Coheirs hold in coparcenary: they are called coparceners, because they participate in one inheritance, derived to them by one title. Though they participate, our books say, no man doth know his part in severalty: they therefore occupy that which is capable of occupation, in common. But though no one knows his part in severalty, yet each man's quantity of interest in the whole inheritance is well known: for instance, if he is one of two coheirs, he is entitled to a moiety; if one of three, to a third, and so on; and if the subject of the inheritance is in its nature partible, lands for instance, he may sue his writ of partition, and make division of the subject into moieties, thirds, &c. as the case shall be. And, when that is done, instead of participating in one inheritance, each coparcener takes the part allotted to him in severalty. He then loses his character of coparcener, and becomes sole owner of the part allotted to him: but it must be remembered, that the effect and operation of this partition pur-

sues the nature of his original right in the whole inheritance; he has still but a part of it, though he holds it in a different manner. This operation of partition is, of necessity, confined to inheritances, the subject of which is in its nature partible; it applies not to inheritances in their nature impartible. Coheirs must, therefore, continue to hold such inheritances for ever, in the same manner as they held partible inheritances before partition; with this difference only, that the law has provided certain means, adapted to the nature of some impartible inheritances, for enabling coheirs to hold them in coparcenary, with benefit and advantage to the whole body of the coheirs; and with due regard to the quantity of interest each of the coheirs may claim in the inheritance.

"Thus the coheirs of an advowson present by turns; and the castle goes to the elder coheir, she making compensation to the others; and other instances might be mentioned.

"A peerage is a most transcendent honour and dignity: but it is still in the eye of the law an inheritance, and it will descend to coheirs in the same manner as other hereditaments do descend. The title of the coheirs of a barony is that of *unus hæres, unum corpus;* it is *unitas juris:* they must take it, and it must vest in them, as the heir of the ancestor. This inheritance stands at the head of the class of inheritances, in their nature impartible. But it is an inheritance of such a nature, producing fruits of dignity and of public duty, individual and incommunicable by any of the common means which the law has provided for the enjoyment of impartible inheritances; that when it happens to vest in coheirs, it necessarily falls into a dormant state. No single coheir can assert a claim to it, for such a claim would be contrary to his interest: he does but participate in the inheritance; he can therefore sustain no claim to the whole of it. And this inheritance is so singularly circumstanced, that even the whole body of the coheirs can assert no claim to it, because they are incapable of possessing, or in any manner of enjoying it.

"When this inheritance is in this dormant state, it is said to be in abeyance; not in abeyance in the ordinary sense of the term, as was observed by Mr. Attorney-General, in which it is applied to an estate in fee simple or freehold in suspense, floating, fixing no where, and vesting in no one: but it simply de-

notes, that the title to a barony, which has descended upon, and is vested in coheirs, remains in them in an inactive and dormant state, incapable of being asserted or being enjoyed. That none of the ordinary means provided by law for making impartible inheritances productive to coheirs could be applied to this inheritance. One remedy, and one only, has been provided by law for the case of a dormant peerage: it is, *sui juris*, of a most extraordinary nature, but very suitable to the dignity of the subject to which it is applied: I mean the prerogative right of calling one of the coparceners, by writ of summons, to sit in the seat of his ancestor. He will, from thenceforth, be in the exclusive possession and enjoyment of the inheritance, and will hold it to him and the heirs of his body: yet still he is but one of the coheirs of his ancestor, and the rest of the coheirs still remain coheirs: and, in the event of the failure of heirs of the body of that coheir, whom the prerogative hath thus preferred, the other coheir (if but one) would take the whole inheritance; or, if there were more than one, the barony would again fall into abeyance. I have stated what I take to be the true nature of this abeyance of a barony: it falls into abeyance, because, in point of right, no one coheir can sustain a claim to it; and because all the coheirs together, though they constitute the complete heir to the ancestor, cannot claim it with effect, and therefore cannot claim it at all. The effect of the prerogative right of calling one of the coheirs to sit in the seat of his ancestor, is not to change the nature of his original title to participate in the inheritance; nor does it in any manner enlarge the quantity of his interest in the inheritance, as it stood originally; it takes nothing from the title of the other coheirs. It does not attract their portion of the heirship, and unite it with that of the coheir preferred: but it creates a title to sit in the seat of the ancestor, in a great degree collateral to the title by inheritance. The prerogative is only restricted to issue the writ of summons to one of the persons who has part or share in that title: the interposition of the prerogative is, as I have before observed, *sui juris*, entrusted to the Crown, in order to qualify the necessary consequences of the law of descent to coheirs, as applied to the inheritance of a barony; and, I apprehend, it proceeds upon the ground of the law being as I have stated it to be. It was with

great ability, and very ingeniously, turned by the counsel for the claimant, and used to qualify the law of descents itself, instead of the effects of the law. It was not denied that in general many coheirs make but one heir: but it was said, that this would be an inconvenient and an absurd doctrine, as applied to a barony. That the coheirs of a barony were all of the blood of the ancestor, and must all be capable of the honour, and sitting in the seat of the ancestor; inasmuch as the King, by his prerogative, could prefer any one of the coheirs, and place him in the seat of the ancestor: that there were, therefore, in the coheirs of a barony, a plurality of persons, all capable of succeeding to the dignity; and that they were therefore, in effect, a plurality of heirs. Upon this they proceeded to erect their fabric.

"A barony, say they, falls into abeyance only because there is a plurality of heirs capable of taking the peerage; and the law knows not how to select one from amongst them. But this is the office of the *pater patriæ*, entrusted to the Crown so long as the necessity exists; and the necessity exists so long as the plurality exists. That as the law abhors abeyance, the moment the plurality of persons capable of sustaining the dignity is by any means removed, and only one of the coheirs thus capable of sustaining the dignity is left, the barony is no longer in abeyance; the Crown no longer finds any thing upon which the prerogative can act: and, if the barony is neither in abeyance nor extinct, it must vest in the single coheir, who is thus left without a competitor. If they had built upon solid foundations, it might have been necessary to have gone further into this case, in order to see whether the plurality they speak of has been removed; and to have examined with care the actual situation of the other branch of this noble family, the Norris branch; to have considered it as it stood on the death of Sir John Norris without issue, which is the moment when the sole right of this barony is supposed to have vested in the ancestor of the claimant; the situation of the Norris branch, after the act of parliament had passed for the restoring the issue of Henry Norris in blood; and the possible situation of the Norris branch, supposing the issue of Henry (who was attainted) hereafter to fail, and the issue of his sisters to continue. Out of this examination, many questions of grave and weighty consideration would arise; and they would

require more time for a satisfactory discussion of them than at this period of the sessions of parliament could probably have been spared.

"Your Lordships might possibly entertain a doubt with regard to these questions, as well as to another question; namely, whether the title to a barony can survive, when it is become impossible that all the component parts of it can vest in one person. Your Lordships may entertain a doubt, whether, as to questions of this nature, there are the proper parties before you, whom these questions do, in point of inheritance, concern.

"But, my Lords, upon the best consideration we could give to the case now in judgment, we humbly offer it to your Lordships, as our clear opinion, that the argument in support of the plaintiff's title is fallacious; and he being but a coheir, his claim to be solely entitled to this barony, as it has been made for him, is unfounded.

"My Lords, the nature of the prerogative right infers no capacity in the coheir. The prerogative is, on the contrary, a provision for the incapacity of the coheir. There is no plurality of persons capable: the plurality is of persons incapable, either standing alone or even uniting. The abeyance is not produced, by the law not knowing how to select from among capable persons: the abeyance is, because there is no one capable, and also because all are incapable. Abeyance cannot determine by the removal of a plurality of persons capable, because such a plurality never existed: abeyance determines by uniting all the detached parts of the title in one, and by that means restoring to the title activity and capacity to be possessed and enjoyed. And unless the claimant could make out that the effect of the actual situation of the other coheir at the period he has chosen to fix upon, namely, the death of Sir John Norris without issue, was such, that all the component parts of the title of heirship did unite in this claimant, he can never take this barony out of abeyance by his own strength, or sustain a claim to be solely entitled to it. This is the ground upon which the Attorney-General stood, and we apprehend he has sustained it.

"In this case we have not derived much assistance from authorities or precedents. The case of the barony of Powis was mentioned, and seemed to approach this. We must call that case to the consideration of your Lordships from your Journals,

not being informed of the particular ground of law on which it proceeded. I will mention one case from Coke upon Littleton. Supposing this barony not to be extinct (concerning which we are not called upon to deliver any opinion), and the present claimant be a coheir, let the situation of the other coheir be whatever the counsel for the claimant would wish it to be (except that there is no failure of issue *naturaliter*), the effect of which might be, that the title of that coheir would run upwards to the common ancestor, and from thence fall down in the course of the descent of the Stapleton line, and unite with their title in the person of the claimant; I conceive that one of the cases mentioned by Sir Edward Coke, and upon which the claimant's counsel relied for another purpose, proves, that the claimant cannot make title to the whole inheritance. Sir Edward Coke, on the authority of Fleta, says, if a man be seised of lands in fee, and has issue two daughters, and one of the daughters is attainted of felony; the father dies, both daughters being alive; the one moiety shall descend to the one daughter, and the other shall escheat. It was argued on the part of the claimant, that though one coheir could not make himself complete heir, to take under a limitation in the case of descent, the law was more favourable to coheirs. And it is so; but let the extent of the favour be marked: in the case put, the law pays attention to the real interest of the coheir, and gives it effect by allowing, in the case of two coheirs and one attainted, where the attainder prevented the lands from descending in coparcenary, that part of the inheritance, which fairly belonged to the other coheir, to descend upon her, in the determinate form of an undivided moiety; which proves that she remained in the contemplation of the law but a coheir, entitled only to participate in the inheritance, as she would have done, if her sister had not been attainted: and the utmost favour that could be found was to give her the benefit of that participation in the only way in which she could take it; for, according to the case of Reading *v.* Royston, reported by Mr. Serjeant Salkeld, page 242, there can be no such descent as the descent of a moiety to one coparcener as heir. Which affirms the general rule of law upon which the whole argument rests, that the title of coheirs must, in some manner or other, unite, in order to entitle any one coheir to claim as heir to the ancestor.

"I forbear troubling your Lordships farther. The answer, which the Judges submit to your Lordships, is, that supposing the claimant to have proved himself to be one of the coheirs of the barony of Beaumont, he is not entitled of right to such barony, according to the state of the pedigree last delivered on his part."

26 June, 1795. The House of Lords resolved and adjudged, "that it did not appear that the petitioner was then entitled to the honour, title, and dignity, of Baron Beaumont."

Printed cases, Dom. Proc. 1796. 48. Mr. Stapleton presented another petition to his Majesty, representing, that having established by evidence that he was the sole heir of Joan, Lady Stapleton, and one of the coheirs of Henry first Baron Beaumont: and that, though not exclusively entitled to the said barony, he had proved himself to be one of the rightful heirs of the said barony; but the said barony being in abeyance, the same was in his Majesty's disposal: the petitioner therefore prayed, that his Majesty would be graciously pleased to declare, allow, and confirm to him and his heirs the said barony of Beaumont. This petition was also referred to the Attorney-

13 March, 1798. General, and afterwards to the House of Lords; where it was resolved by the Committee of Privileges, that the barony of Beaumont was vested in William Viscount Beaumont, by descent from his father, John Lord Beaumont (who was summoned to and sat in parliament 11 Henry 6.) as a barony in fee: that the said barony remained in abeyance between the coheirs of the said William, descended from his sister Joan; and that the petitioner was one of those coheirs. (*a*)

Descent of baronies created by writs to the eldest sons of peers. 49. With respect to baronies created by writs of summons to the eldest sons of peers, by the name of baronies vested in their fathers, it has been determined that they are hereditary in the blood of the persons so summoned, and descendible to their heirs; therefore, that where the eldest son of a peer is called up to the House of Lords by writ, and takes his seat, and dies in the lifetime of his father, the dignity will descend to his son.

(*a*) Notwithstanding the respect which is justly due to the very learned opinion of the judges in this case, yet it may be observed that, as the doctrine of abeyance was originally founded on the impartible or indivisible nature of a dignity, and as all power of inheriting the barony of Beaumont, by one of the coheirs, is destroyed by the attainder, by which Mr. Stapleton is become the only person capable of enjoying it, he must be allowed to have a stronger claim on the Crown for a confirmation of the dignity, than perhaps ever existed in a coheir to a barony. *Note by Mr. Cruise.*

50. The barony of Clifford of Launsburg was granted by letters patent to the Earl of Cork and the heirs male of his body. Afterwards he was created Earl of Burlington. Charles, his eldest son, was called up to parliament by the title of Lord Clifford of Launsburg, in his father's lifetime; and having taken his seat under that writ, died, leaving a son, who, in 1694, claimed to be entitled to the said barony to which his father had been called, living his grandfather.

Barony of Clifford of Launsburg. Journ. Vol. XXV. 11—39.

"The Lord President reported from the Lords' Committee of Privileges, to whom it was referred to consider, whether, if a lord, called by writ into the father's barony, shall happen to die in the lifetime of his father, the son of that lord so called be a peer, and hath right to demand his writ of summons? That their Lordships find no precedent in this case."

"A debate arising, whether Charles Lord Clifford, (son and heir of Charles late Lord Clifford, of Launsburg, deceased,) who was called by writ to parliament in the lifetime of his father, the present Earl of Burlington, hath right to sit in parliament, this house was of opinion, that the said Charles, now Lord Clifford, hath right to a writ of summons to parliament as Lord Clifford, of Launsburg." A writ of summons was issued to him, and he took his seat accordingly.

51. Where a writ of summons is issued to the eldest son of a peer, by the name of a barony not vested in his father, it operates as a new creation of a barony; and makes it descendible to all the lineal heirs, male and female, of the person so summoned.

52. In the third year of King Charles I., James the eldest son of William Earl of Derby, was called up to the House of Lords by a writ directed *Jacobo Strange, Chevalier*, and was seated in the place of the ancient barons of Strange, of Knockin, though that barony was not in his father.

Barony of Strange. Printed cases. 1736. Journ. Vol. XXV. 11.

This title descended to William Earl of Derby, who died without issue in 1735.

James Duke of Athol, who was the heir general of William Earl of Derby, claimed the barony of Strange, created by this writ of summons; stating, that King Henry VII. had created Thomas Lord Stanley Earl of Derby, to him and the heirs male of his body; that the said title and dignity came by mesne descents to Ferdinando Earl of Derby, who died seised thereof,

leaving three daughters; that the said Ferdinando did not die seised of any title or dignity of a baron created by letters patent; and whatever titles and dignities he had, which were created by any writ or writs of summons to parliament descended to his said three daughters.

That the said title and dignity of Earl of Derby came to William, brother of the said Ferdinando, as heir male of the body of the said Thomas; but the said William never was seised of the title or dignity of a baron.

That James, the petitioner's ancestor, whose heir he was, eldest son of the said William, was summoned in 3 Cha. 1. as a baron, the writ being directed *Jacobo Strange, Chevalier;* and being also summoned to several succeeding parliaments, sat and voted by the title of Lord Strange, in the lifetime of his father, the said William Earl of Derby.

That upon the death of the said William Earl of Derby, the said James Lord Strange succeeded to the said title and dignity of Earl of Derby; and died seised thereof, to him and the heirs male of the body of the said Thomas Earl of Derby, and of the said title and dignity of Lord Strange to him and his heirs. And the said title and dignity of Lord Strange came by mesne descents to the then late Earl of Derby, who died without issue in 1735.

That the said James Duke of Athol was cousin and next heir to the said then late Earl of Derby, and great grandson of the said James Lord Strange, and consequently entitled to the said title and dignity of Lord Strange.

That the only objection which had been made to his claim was, that the heralds ranked the Lord Strange in the place of the ancient barons of Knockin; from which two arguments were drawn,—1st, That the said James had no right by descent to the old barony of Strange of Knockin, because that descended to the three daughters and co-heiresses of Ferdinando; and the writ of summons directed to him by the name of James Strange, Chevalier, could not operate as a new creation, because he was not ranked as puisne baron, but took an ancient place.

2d, Though the rank given by the heralds to the Lord Strange could not take from him his right to sit and vote as a lord of parliament, by virtue of the King's writ, yet it was to be looked on as an evidence, that the King thought the old barony of Strange, of Knockin, was in William Earl of Derby, and in-

tended to summon the Lord Strange into his father's barony; and therefore, William Earl of Derby having no barony into which his son could be summoned, the King was deceived. To which it was answered, that the fact of Ferdinando's having left three daughters was then fully known; for it appeared by an entry on the Journals, that upon a claim made by Anne Countess of Castlehaven, the eldest daughter and one of the co-heirs of Earl Ferdinando, it was ordered that the writ of summons, and the rank and place of the said James, should be no way prejudicial to the right and claim of the said Anne, or any of the daughters and co-heirs of the said Ferdinando. Vol. III. 841.

That the King's grant of nobility by writ of summons was not governed by any of the rules by which his gift of lands was governed at the common law. The King's gift of lands was not good, but by his letters patent, and by special words of grant. No inheritance passed from him without the word heirs; and if he was deceived in the motive which induced him to grant, his grant was void, and he might by his prerogative repeal it by *scire facias*. But if a commoner was once summoned to parliament, and sat, his blood was ennobled, and his title and dignity descended to his heirs; though the King's motive to summon him was merely personal, viz. to have his advice and counsel; though there were no words in the writ of summons from which the King's intention could be collected, to give to the person summoned the state, title, and dignity of a baron, much less to expound it an estate of inheritance. When the person summoned sat, the writ of summons had its full effect, and could not afterwards be avoided, or made not to have been. His creation into the state and dignity of a baron was by operation of law, in consequence of his once sitting; and did not depend on the King's intention, which it would be of dangerous consequence to be guessing at, after such a length of time. The only point on which such a barony depended was, whether the person summoned sat. If he once sat in parliament, the law ennobled his blood, and gave him a barony in fee.

The House of Lords resolved, that the petitioner was entitled to the said barony of Strange, created by the said writ in 3 Cha. 1. Lords' Journ. Vol. XXV. 39

53. In the next year, Richard Earl of Burlington claimed the dignity of Baron Clifford; stating, that Robert de Clifford was summoned to parliament in 28 Edw. 1. as a baron, and that the Barony of Clifford, Lords' Journ. Vol. XXV. 112. Printed case, 1737.

said barony came by mesne descents to Henry Lord Clifford, who was created by King Henry VIII. Earl of Cumberland, to him and the heirs male of his body. That the said title came by mesne descents to George Earl of Cumberland, who died, leaving only one daughter, the Lady Anne, by which the title and dignity of Earl of Cumberland came to Sir Francis Clifford, brother to the said George, as heir male of the body of the said Henry: but the said Francis never was seised of the title or dignity of a baron. That the said barony of Clifford descended to the said Lady Anne Clifford, from whom it descended to the daughters and coheirs of the then late Earl of Thanet. That Henry Clifford, (the petitioner's ancestor,) eldest son of the said Francis Earl of Cumberland, was summoned to parliament in the lifetime of his father, in 3 Cha. 1., without any letters patent, the writ being directed *Henrico Clifford, Chevalier*, and sat and voted in that and several succeeding parliaments. That the said Henry Lord Clifford left issue only one daughter, Elizabeth, who intermarried with Richard Earl of Burlington, to which Elizabeth Countess of Burlington, the petitioner was great grandson and heir. That therefore the title and dignity created by the said writ of summons, in virtue of which the said Henry Clifford sat and voted in parliament, was descended to the petitioner, who was sole heir to the said Henry Lord Clifford.

Id. 130. The House of Lords resolved, that the petitioner was entitled to the barony of Clifford, created by the said writ.

54. There can be no doubt but that the Crown, in the two preceding cases, issued its writs of summons upon the idea that the baronies, by the names of which these persons were summoned, were then vested in their fathers: but this proving to have been a mistake, the House of Lords was obliged to admit that the writs operated as new creations.

Is the same as that of the ancient barony.

55. It is observable, that in the two preceding cases the claimants stated, that the baronies, by the names of which their ancestors were summoned, were not then vested in their fathers. From which it may be inferred, that an opinion then prevailed that there was some difference between the operation of a writ of summons to the eldest son of a peer by the name of a barony vested in his father, and that of a similar writ, by the name of a barony, not vested in his father.

56. This idea was probably first suggested by the "Inquiry

into the Manner of creating Peers;" where, speaking of the practice of calling up the eldest son of a peer to the House of Lords by the title of a barony then in his father, the author says, —"The writ of summons therefore seems, not so much to be considered as the creation of a baron, but only as an instrument of conveyance, or method of transferring a barony or honour from one person to another. For if it is not so, what reason can be given why the eldest son of one earl, summoned by the title of his father's barony, shall have precedence according to the rank and antiquity of that barony; and that the eldest son of another earl, if he be by patent created to a title or barony foreign to his family, shall be considered as the youngest baron; and to take his place in the House accordingly. I speak, and I think every man ought, with great submission on this subject: but, if I mistake not, the law even at this day is, that though the last of these persons takes a barony in fee, or otherwise, according to the limitations of it; yet the first, upon whom the writ operates only by way of instrument of conveyance, has no other title in the barony than his father had, from whom it was conveyed; and therefore if the father has only an estate tail in the barony, the state of the son, though summoned by writ, is not enlarged nor made a fee, and descendible to his heirs general."

Manners of Haddon, ante.

The doctrine here laid down has been adopted by the House of Lords in the following case.

57. King James I. by letters patent created Sir Robert Sydney, Lord Sydney of Penshurst to him, and the heirs male of his body; and afterwards created him Viscount Lisle and Earl of Leicester, with the same limitations. These titles descended to his grandson Philip, whose eldest son Robert, by curtesy Viscount Lisle, was in 1 William and Mary summoned to parliament by writ, and sat and voted under such writ by the title of Lord Sydney of Penshurst, in the lifetime of his father. These titles descended to John Sydney, the son of Robert, who died without issue, leaving the two daughters of his next brother, Mary and Elizabeth Sydney, his heirs general, and Jocelyne his youngest brother, his heir male; who became Earl of Leicester, and afterwards died without issue, by which the dignities limited to the heirs male of Sir Robert Sydney became extinct.

Barony of Sydney. Printed case, 1782. See the L'Isle Peerage case, p. 14,

Upon the death of Mary Sydney without issue, Elizabeth her

sister, who had married Mr. Perry, claimed the barony of Penshurst, as the sole heir of Robert Sydney, who was summoned to parliament by writ.

The Attorney-General (Mr. Wallace) stated in his report, that the petitioner claimed the barony of Sydney of Penshurst, as being the sole heir general of the body of Robert Sydney, who was called to parliament by writ *in vitâ patris*; upon a supposition that the effect and operation of the writ of summons to parliament, without letters patent, and his having sat in parliament in pursuance thereof, vested a title in him to the barony, descendible to his lineal heirs. That a writ of summons to parliament, and a sitting in pursuance, did certainly, in general cases, ennoble the person and his descendants: but he conceived that the effect of a writ of summons to the eldest son of an earl or viscount, by the title of his father's barony; or to the eldest son of a baron, who had two or more baronies, to one of his father's baronies; was to accelerate the succession of the son to the barony, which, on his father's death, would descend to him: and the extent of the inheritance depended upon the nature of his father's title to the barony, whether in fee or in tail male. That the usual manner of calling up the son of a peer *in vitâ patris* was, by writ of summons to the barony of the father: and the persons thus called had been constantly placed in the House of Lords according to the antiquity of their father's barony. Although, since the statute 31 Hen. 8. c. 10. for placing the Lords, whereby the precedency of peers was fixed and established, the right to such precedency had at different times come under the consideration of the house; and although it did not appear that the house had determined the point; yet it was highly probable that the Lords had satisfied themselves, that the eldest sons of peers, called up by writ into their fathers' baronies, were entitled to the same precedence and rights, which they would have been entitled to, if they had succeeded to the same by descent; and that the calling them up by writ in their father's lifetime only accelerated the possession.

Lords' Journ. Vol. IV. 35. Vol. XV. 523.

That he was of opinion that the effect of a writ of summons to Robert Sydney, to his father's barony, gave to him the like inheritance his father had in the barony, which was restrained to heirs male; and that the petitioner was not, as heir general, entitled to the barony; but as the case appeared anomalous, and

never to have been precisely determined, he thought it adviseable to refer it to the House of Peers.

The case was accordingly referred to the House of Peers; and on the part of the claimant it was insisted, that a writ of summons to parliament, directed to any temporal person, who sits in pursuance of it, although it contains no words of limitation, ennobles the person to whom it is directed, and his lineal descendants, or, as it has been sometimes expressed, gives a barony in fee, was a general rule of law, so fully established, and was so little liable to be controverted, that it was presumed to be unnecessary to refer to the innumerable authorities contained in the books of law, and the resolutions of the House of Peers, in support of it.

The claim must therefore be admitted, unless it could be shewn, that the effect of a writ of summons, directed to the eldest son of an earl or viscount, by the same title as that of his father's barony, or to the eldest son of a baron, who had two or more baronies, by a name the same as that of one of his father's baronies, was different from the effect of a writ of summons directed to other commoners. The Attorney-General had adopted a notion of this sort; and stated in his report, that the effect of a writ of summons in such cases was, to accelerate the succession of the son to the barony, which, on his father's death, would descend to him; and that the extent of the inheritance depended on the nature of his father's title to the barony, whether in fee or in tail male.

It was admitted by the Attorney-General that a writ of summons so addressed, if its effect was such, formed an anomalous case, and a case which had never been precisely determined. It was contended further, that this doctrine of acceleration was perfectly novel; that it never occurred before to any of the great lawyers of this country, that a writ of summons, in such cases, had such an operation; and that there was nothing of authority to be found in any law book, or in the Journals of Parliament, to countenance the notion. The practice of thus calling to parliament the sons of peers was stated by the report to have existed as far back as the reign of Edw. IV.; and if the doctrine of the report could be maintained, it was extremely singular that every lawyer who, since the law of parliament upon this subject, had been considered as settled, had treated upon

the effect of a writ of summons to parliament, in which there were no words of limitation, (with exception only of the author of a tract upon the Origin and Manner of creating Peerages, whose reasoning the report seemed to abandon, though it adopted the result of it, and who contended against many of the most acknowledged principles of the law relating to peerages,) should have stated in general terms, without reserve, qualification, or exception, that such a writ operated to ennoble the person to whom it was directed, if he sat in consequence of it, and his lineal descendants. By all writers of authority it had been observed, that letters patent, in which there were no words of limitation, gave the grantee a dignity for life only: but it did not seem to have occurred to any such writer, that a writ of summons, where there were no such words, could enure to the person to whom it was addressed, for his life only; or could enure, where there were not special words in the writ, so to direct the course of the inheritance, to him and his heirs male, or any other particular line of descendants. It might be safely assumed that the doctrine was not to be found in any law book of authority; and was so extremely singular, that it might be very confidently asserted, that if the law acknowledged the doctrine, it could not have been unknown or unnoticed by the several great lawyers who had considered the nature and effect of these writs.

Ante, c. 1.

The House of Lords resolved, that the claimant had no right in consequence of her grandfather's summons and sitting.

Descent of dignities created by letters patent.

58. It has been stated in a former Chapter, that where a dignity is created by letters patent, the state of inheritance must be limited by apt and proper words, or else the grant is void: and where the mode of descent is marked out, the dignity will of course be transmissible to that class of heirs who are designated in the letters patent. Thus under the common patents the dignity descends to the heirs male of the body of the person first ennobled.

59. A person claiming a dignity of this kind must deduce his pedigree entirely through males: but a brother of the half blood may inherit; for Lord Coke says, the issue in tail is ever of the whole blood to the donee.

1 Inst. 15 b.

60. By letters patent in 16 Ch. 1., William Howard and Mary his wife, the only sister and heir of Henry Baron Stafford, were

created respectively Baron and Baroness of Stafford, to hold respectively to the same William and Mary, and the heirs male of the bodies of the same William and Mary lawfully begotten, or to be begotten; and for default of such issue, then to the heirs of the bodies of the same William and Mary lawfully begotten, or to be begotten.

61. The most singular limitation of a dignity, which I have seen, is that of the barony of Lucas of Crudwell. It was granted by letters patent, 15 Cha. 2., to Mary Countess of Kent, to hold to her and the heirs male of her body begotten by the Earl of Kent: and for want of such issue to the heirs of her body by the said earl, with a declaration, "that if at any time or times after the death of the said Mary Countess of Kent, and in default of issue male of her body by the said earl begotten, there shall be more persons than one, who shall be coheirs of her body by the said earl, the said honour, title, and dignity shall go, and be held and enjoyed, from time to time, by such of the said coheirs, as by course of descent of the common law should be inheritable to other entire and undivisible inheritances, as namely, an office of honour and public trust, or a castle for the necessary defence of the realm, or the like, in case any such inheritance was given or limited to the said Mary, and the heirs of her body by the said earl begotten." And by a private act of parliament, 15 Cha. 2., this declarative clause is ratified and confirmed.

62. The dukedom of Marlborough is limited to the eldest daughter, in default of males, by the letters patent; which are confirmed by an act of parliament. 5 Ann. c. 3.

63. There are several cases where dignities have been claimed under letters patent, in which the principal difficulty was to derive a pedigree from the original grantee. Cases of claims to dignities of this kind.

64. Thus in 1707 W. F. Carey petitioned the Crown for the barony of Hunsdon, stating that Sir Henry Carey was by letters patent 1 Eliz. created Baron Hunsdon, to him and the heirs male of his body. That the said dignity had descended to the petitioner, who was born beyond seas, but naturalized by act of parliament as lineal male heir of Sir Henry Carey, first Baron Hunsdon. This petition having been referred to the House of Lords, it was resolved that the claimant had sufficiently proved his pedigree and title to the said barony, and he was seated accordingly. Barony of Hunsdon, Printed case, Journ. Vol. XVIII. 491.

Viscounty of Say and Sele. Journ. Vol. XIX. 64.

65. Lawrence Viscount Say and Sele petitioned the Crown in 1709, for a writ of summons to that dignity, stating that his grandfather William, then Baron Say and Sele, was by letters patent, 22 Jac. 1. created Viscount Say and Sele, to him and the heirs of his body. That the said William had four sons, James, Nathaniel, John, and Richard. That he was succeeded in that honour by his son James, who dying without issue male, was succeeded by William, then the only son of Nathaniel the second son, who died in the lifetime of James. That the said William died in 1698; and was succeeded by Nathaniel his only son, who died without issue, by which the honour was devolved upon the petitioner, as the only issue male of John, the third son of the first viscount.

The petition having been referred to the House of Peers, it was there resolved that the petitioner had a right to a writ of summons to parliament; which was accordingly issued.

Dukedom of Somerset, Collins' Peerage, Vol. I. 200.

66. Sir Edward Seymour claimed in 1750 the dukedom of Somerset, under a limitation in remainder to his ancestor, and the heirs male of his body, in letters patent of 1 Edw. 6.

The case was referred to Sir Dudley Ryder, then Attorney-General, who reported that the petitioner had sufficiently proved his right; and a writ of summons was issued to him as Duke of Somerset, under which he took his seat.

Earldom of Anglesey. Printed case, 1771.

67. Arthur Annesley petitioned the King in 1770, for the dignities of Earl of Anglesey and Baron Newport Pagnel, stating that King Charles II. had granted those honours to Arthur Annesley, to him and the heirs male of his body. That Richard, the heir male of the said Arthur, succeeded to those honours in 1737, and was summoned to and sat in parliament in 1738, and to the time of his death in 1761.

That in 1737, Arthur Earl of Anglesey died, whereupon Earl Richard entered on the family estates; took his seat in the House of Peers, both in England and Ireland; and in 1741, when his first wife died, he married on the 15th of September Juliana Donovan; the ceremony being performed by Lawrence Neale, his Lordship's chaplain, in the presence of Charles Kavannagh, his steward, and Nixon Donovan, the brother of Juliana: but the marriage was kept secret on account of the perplexed situation of the earl's affairs, and his disputes with some branches of his family.

That the earl had issue by his lady four children; the claimant, who was born in 1744, and three daughters.

That in 1752, Earl Richard being apprehensive lest his family should be exposed to the hazard that attends a private marriage, of which all the witnesses, except the clergyman, were then dead; resolved to make his marriage more authentic by an open celebration of it; and Mr. Neale, who had formerly performed the ceremony, having come to Earl Richard's seat, the 8th of October, 1752 was appointed for the republication of the marriage, which took place accordingly, in the presence of nine gentlemen and ladies of the neighbourhood, all of whom signed the following certificate:—"We, the undernamed persons, were present this 8th day of October, when the Right Honourable Richard Earl of Anglesey acknowledged he had intermarried with Juliana Donovan, Countess of Anglesey, on the 15th day of September, 1741. And at the same time the said countess produced the certificate of the said marriage, in our presence and he the said Richard Earl of Anglesey declared he was determined to have the said marriage ceremony performed over again, to prevent any future dispute in his Lordship's family, as most of the witnesses that were present at that marriege are since dead; and we accordingly saw his Lordship married over again this present day above mentioned."

From this time the earl continued to live publicly with Juliana his countess, as his wife; and to educate the petitioner and his other children by her, suitable to his rank, down to his death in 1761; being uniform to the last hour in acknowledging the marriage and legitimacy of his children.

Earl Richard died in 1761, leaving the petitioner his only son and heir, who during his minority was called upon to vindicate his Irish honour, upon a claim interposed by John Annesley, as lineal heir of the original grantee, which was referred to the Attorney and Solicitor-General of Ireland, who, after a long examination of witnesses in which the petitioner's legitimacy was the only question, reported that the Irish honours were legally vested in the petitioner, as only son and heir male of the body of Richard, late Earl of Anglesey; in consequence of which the petitioner was summoned to the parliament of Ireland, and took his seat there.

That soon after the claimant petitioned his Majesty for a writ

of summons to call him to the parliament of Great Britain, as Earl of Anglesey; which being referred to the Attorney-General, (Mr. De Grey,) together with the report and evidence laid before the Attorney and Solicitor General of Ireland, he proceeded to take the same, and such other evidence as was laid before him by the petitioner, into consideration; and reported that his Majesty might properly, if he should so please, order the usual writ of summons to issue for calling the petitioner to the parliament of Great Britain.

In consequence of a petition which had been presented to his Majesty by the daughters of Ann Simpson, who had claimed to be the wife of Earl Richard; it was referred back to Mr. De Grey to reconsider his report, who made his second report on both petitions, recapitulating the whole evidence on both sides, and discussing and deciding upon every question in the petitioner's favour; and again concluding,—"That from the best consideration he had been able to give the case, upon such proofs as had been laid before him, he was of opinion that the petitioner was the legitimate son of the late Earl of Anglesey, and as such entitled to the English honours of Earl Anglesey, &c.

The case having been referred to the House of Peers, was there heard for several days; and the committee resolved, by a majority of one, (thirteen peers being present,) that the claimant had no right to the titles, honours, and dignities claimed by his petition: which resolution was, upon a division,

April 22, 1771. adopted by the House. (*a*)

(*a*) It is stated by Mr. Andrew Stuart, in his Letters to Lord Mansfield, on the Douglas cause, that in the Anglesey case a majority of peers conceived that the names of the witnesses to the certificate were forged; the certificate having been long in the possession of Lady Anglesey; and held that this forgery had the effect of vitiating and discrediting the whole of the evidence. But Lord Mansfield was of a different opinion, on this ground, that the evidence, as to the certificate, only amounted to a doubt or suspicion of forgery; and that where there was on the one side positive, clear, and consistent parol evidence, and on the other only doubt or suspicion of forgery, he thought it the duty of every lord to whose mind the matter appeared in that light, to be governed by the parol evidence; and not rashly to presume that Lady Anglesey and several of the other witnesses in the cause were perjured. That it would be giving too great an authority to a mere doubt or suspicion of forgery, to allow it to outweigh the whole of the parol evidence; and to infer an imputation of perjury against Lady Anglesey, and the other witnesses who had deposed in support of the marriage, and of the certificate. Lord Mansfield's doctrine is supported by Lord Eldon in the case of Lloyd *v.* Passingham, 16 Vesey's Rep. 59. *Note by Mr. Cruise.*

68. Soon after this resolution three persons claimed the Irish dignities of Viscount Valentia and Baron Mountnorris; and their petitions having been referred to the House of Peers of Ireland, a very long examination of the proofs of the private marriage in 1741 took place there; and the House appears to have been satisfied that such marriage had been duly celebrated, for it was resolved that none of the claimants had proved a right to those dignities. So that Arthur Viscount Valentia was in fact held to be the legitimate son of Richard Earl of Anglesey, by the House of Peers of Ireland, in direct contradiction to the resolution of the House of Peers of Great Britain.

69. The Rev. E. T. Brydges claimed the barony of Chandos, stating that Queen Mary by letters patent, in the first year of her reign, granted to Sir John Brydges knight, the title and dignity of Baron Chandos of Sudeley, to hold to him and the heirs male of his body. That the said John first Lord Chandos had issue three sons, Edmund his eldest son, Charles and Anthony his second and third sons, and other issue. That the title of Baron Chandos descended to Edmund the first son; and continued in his issue male until the death of William seventh Lord Chandos without issue male, when the line of Edmund the eldest son of John first Lord Chandos failed. Barony of Chandos, 1790. Printed Case.

That the title then descended to Sir James Brydges, Bart., eighth Lord Chandos, who was the great grandson and heir male of the body of Charles, the second son of the first Lord Chandos; and continued in his issue male until the death of James Duke of Chandos in 1789 without issue male; when there was a total failure of heirs male of the body of Charles, the second son of the first Lord Chandos. And, upon such failure, the claimant submitted that he was entitled to inherit the said honour and dignity, as heir male of the body of Anthony, the third son of the first Lord Chandos.

The Attorney-General reported that he conceived the claimant had proved himself to be heir male of the body of John, first Lord Chandos, and as such entitled to the honour and dignity of Baron Chandos of Sudeley; by evidence which, although not without some difficulty, would be probably deemed sufficient to prove his title to any other species of inheritance, the foundation of which was laid so far back as the year 1554.

The petition and report having been referred to the House of Peers, a majority of the Committee of Privileges not thinking the evidence sufficient, it was resolved that the petitioner had not made out his claim to the title and dignity of Baron Chandos, which was adopted by the House.

Marquisate of Winchester.

70. George Powlett claimed in 1796 the marquisate of Winchester, earldom of Wiltshire, and barony of St. John. The Attorney-General (Sir J. Scott) reported that it appeared from the enrolment of letters patent in the Rolls Chapel, that in 30 Hen. VIII., Sir William Powlett was created baron St. John to him and the heirs male of his body; and in 3 Edw. I. was created Earl of Wiltshire to him and the heirs male of his body; and in 5 Edw. VI., was created Marquis of Winchester to him and the heirs male of his body. That the original letters patent were all lost: but the enrolments were sufficient evidence to prove that such letters patent were really granted.

That the said George Powlett the petitioner was the heir male of the body of the said William, the first Marquis of Winchester, Earl of Wiltshire, and Baron St. John; and had sufficiently proved his right to the said titles, under the patents above mentioned.

A writ of summons was issued to the petitioner, as Marquis of Winchester, under which he took his seat in the House of Peers.

Earldom of Banbury.

71. W. Knollys claimed the earldom of Banbury, stating that W. Lord Knollys, and Viscount Wallingford was created Earl of Banbury in 2 Cha. I., by letters patent, in which a precedence was given to him over some persons who had been created earls a short time before. And the House of Lords having complained of this, the King sent them a message, shewing the occasion of his granting this precedence, and his desire that the earl, being old and childless, might enjoy it during his time.

The earl died in 1632; and by an inquisition taken at Burford it was found that he died without heirs male of his body. But by another inquisition taken seven years after, at Abingdon, it was found that Edward Earl of Banbury was his son and next heir; and that he left another son named Nicholas.

The first of these inquisitions was found in consequence of an opinion which then prevailed, that the said Edward and Nicholas were illegitimate, not that during the gestation of them their

mother lived apart from her husband, and that they were without access to each other; but because Lord Banbury was greatly advanced in years, and that his wife, who was comparatively young, was suspected of an illicit intercourse with Lord Vaux, to whom she was married after the death of the earl; and that the birth of those children was concealed from Lord Banbury.

Edward the eldest son died under age; and his brother Nicholas claiming to be earl of Banbury, sat in the convention parliament. But it was moved that there being a person then sitting in the House, as a peer, who had no title to be a peer, namely, the Earl of Banbury, it was ordered that the business should be heard at the bar. Nothing, however, appears to have been done in pursuance of this motion; Lord Banbury continuing to sit the whole of that sessions. This Nicholas, not having received a writ of summons to the ensuing parliament, presented a petition to the King, stating himself to be son and heir to William Earl of Banbury; and praying a writ of summons as Earl of Banbury, which being referred to the House of Lords, the Committee of Privileges in 1661 resolved that he was a legitimate person.

It appears from the minutes of the Committee of Privileges that four witnesses were examined, who all swore that the Countess of Banbury was delivered of two sons, Edward and Nicholas, at Harrowden, the seat of Lord Vaux. That their birth was not kept secret in the house, and they were considered as the children of Lord Banbury. One of the witnesses being asked how old Lord Banbury was, answered he knew not: but that he rode a hawking and hunting within half a year before his death, and in all other sports. All the witnesses swore that Lord and Lady Banbury lived together to the time of Lord Banbury's death.

The House, upon receiving this report, resolved that the cause should be heard at their bar, which accordingly took place, when the case was again referred to the Committee of Privileges, who, after hearing counsel and witnesses, resolved that the Earl of Banbury was, in the eye of the law, son of the late earl, and that the House of Peers should therefore advise the King to send him a writ of summons.

Nothing was done by the House upon receiving this report; but some time after a bill was brought in to declare Nicholas

called Earl of Banbury to be illegitimate, which was not proceeded in.

Nicholas Lord Banbury died in the year 1675; and was succeeded by his son Charles, who, having in 1692 killed a person in a duel, was indicted by the name of Charles Knollys for murder, and having removed the indictment into the Court of King's Bench, he there pleaded a misnomer, for that he was Earl of Banbury.

A few days after the indictment was found, Charles Knollys, by the decription of Charles Earl of Banbury, presented a petition to the House of Lords, praying to be tried by the peers of the kingdom; where, after a long discussion, the question was put whether the petitioner had any right to the title of Banbury, which was resolved in the negative.

Jan. 12, 1692.

In the Court of King's Bench, the Attorney General replied to the plea of misnomer, that the said Charles had petitioned the House of Lords, alleging that he was Earl of Banbury, and praying to be tried by his peers; and that it was resolved by the Lords, that he had not any right to the title of Earl of Banbury, to which Lord Banbury demurred. The Court of King's Bench allowed the demurrer; upon the principle that the House of Lords had no jurisdiction in questions of peerage, but by reference from the Crown. The indictment was quashed.

Skin. Rep. 517.

In the year 1697, this Charles Knollys petitioned King William for his title; and his petition being referred to the House of Lords, the Committee of Privileges reported that the House had, five years before, resolved that the petitioner had no right to the title of Banbury.

Charles Knollys died in the year 1740, to whom the claimant was grandson and heir male; and therefore prayed a writ of summons to parliament, as Earl of Banbury; or that the necessary steps should be taken for a full investigation of his case.

This petition having been referred to the Attorney General, (Sir V. Gibbs,) he reported that two questions arose,—1. Whether the resolution of the House of Lords upon the petition in 1692 was conclusive. 2. Whether the petitioner had made out his claim to the dignity by the evidence produced before him. As to the first, he was of opinion that the resolution of the House of Lords in 1692 was not a conclusive judgment against the said Charles. Upon the second, it appeared to him that

the legitimacy of Nicholas was left in a considerable degree of doubt.

The petition and report were referred to the House of Peers, and the case was heard before the Committee of Privileges in the years 1808, 9, and 10.

The counsel for the claimant offered to give in evidence the minutes of the Committee of Privileges upon the claim of Nicholas Knollys in 1661, to which the Attorney General objected; but his objection was disallowed, and the minutes received. After the Attorney General's report, it was discovered that a suit in Chancery had been instituted by the Earl of Salisbury, as the next friend and guardian to Edward Knollys, in which five witnesses were examined, four of whom appeared from their depositions to have been in the service of Lord Banbury, for several years before the birth of the two sons, and also when they were born, and to the time of the death of Lord Banbury; and the other was a physician, who had been in intimacy with him for several years prior to the birth of his eldest son, and continued to be connected with him till his death. The counsel for the claimant offered to give these depositions in evidence; but the Attorney General objected to them on two grounds,—1. Because the suit was, *res inter alios acta*. And, 2. Because it did not appear that the witnesses were connected, in the manner stated by themselves in the depositions, with the persons respecting whom they deposed. The admission of hearsay evidence, in cases of pedigree, being confined to relations interested in the state of the family, and persons intimately connected with it, the Committee of Privileges, after consulting the judges, rejected these depositions.

It was afterwards discovered that Charles Knollys had presented a petition to King George II. claiming the dignity, which having been referred to the then Attorney-General, Sir Philip Yorke, afterwards Lord Hardwicke, he reported the facts; and concluded that as the House of Lords, in their representation to King William in 1697, expressly called their resolution in 1692 a judgment of their House, and on that account declined entering into the merits of the reference made to them by his said Majesty, whether under these circumstances his Majesty would think fit to make a new reference to the House of Lords, was a consideration, not of law, but of prudence, which must be left to his Majesty's royal determination. No reference was made.

The Attorney-General gave in evidence an indenture dated 4th of March, 1630, between W. Earl of Banbury and Elizabeth his wife, of the one part, and Sir Robert Knollys, who was nephew to Lord Banbury, of the other part, whereby the uses of a fine levied by Lord and Lady Banbury, of the manor of Rotherfield Greys, in Oxfordshire, which had been granted by the Crown to Lord Banbury's father, as a reward for services, so that it was within the protection of the statute 34 & 35 Hen. 8., were declared to Sir Robert Knollys in fee; and observed that the estate had continued in his possession under that deed, and had never been claimed by Nicholas Knollys, as the heir male of the body of the first grantee, who might, if he could prove his legitimacy, have recovered it back.

The will of Lord Banbury was produced, in which no mention was made of Edward or Nicholas.

Lastly, the Attorney-General produced a deed executed by Lord Vaux and Lady Banbury, then the wife of Lord Vaux, by which Lord Vaux settled an estate on Nicholas Knollys, who is thus described in it. "The Right Honourable Nicholas, now Earl of Banbury, sonne of the said Countess of Banbury, heretofore called Nicholas Vaux, or by which soever of the said names or descriptions the said Nicholas be or hath been called, reputed or knowne." The case was argued by the Lords in the Committee of Privileges for several days in 1811. Lord Erskine stated the case, and concluded in favour of the claimant. He was answered by Lord Redesdale, Lord Ellenborough, and Lord Eldon, who were against the claim, upon the principle that the acknowledgement of the parents is the first and most essential evidence of legitimacy, and that here the birth of the children seemed to have been unknown to Lord Banbury.

Lord Ellenborough said, it appeared most clearly from the evidence, that Lord Banbury was ignorant of the birth of Edward and Nicholas Knollys. He was married in 1606; and Edward Knollys was stated to have been born in 1627, when Lord Banbury was upwards of eighty; and Nicholas was born in 1630, so that when King Charles I. stated to the House of Lords that Lord Banbury was old and childless, and when Lord Banbury himself, by taking the precedence granted to him in the patent of creation, admitted the fact, Edward Knollys was born. Could it be supposed that the King and Lord Banbury should concur

in such a gross falsehood. And if they did, was it probable that so singular an event as the birth of a child, after twenty-one years' marriage, to so old a man, should be unknown to the peers present, if it had not been then concealed.

That the evidence given before the Committee of Privileges in 1661 was unsatisfactory, none of the witnesses proving that Lord Banbury knew that his lady lay in. And the report that Nicholas was, in the eye of the law, son of the late earl, was founded on the doctrine laid down by Lord Coke respecting legitimacy. This clearly appeared from the following passage in the minutes of the Committee of Privileges:—"Counsel: We have cleared title, pray he may enjoy the liberty and privilege of peer. Coke, 1 Inst. 244. not to be disputed whether son or no, if father be within the four seas, though wife be in adultery. Mr. Attorney, *pro Rege*, confesseth the law clear."

Now the passage relied on from Lord Coke was clearly erroneous, as was shewn by Mr. Hargrave in his note on another part of that work, 126 *a.* in which it was said—"That not only proof of being out of the kingdom, but also every other kind of evidence tending to prove the impossibility, or even improbability, of the husband's being the father, was admissible."

The Committee of Privileges in 1662 appeared to be perfectly satisfied that Nicholas was not in fact the son of Lord Banbury: but conceived that as Lord Banbury was within the four seas, the law deemed Nicholas legitimate.

The suit in Chancery to perpetuate the testimony of witnesses appeared to be a mere collusion. There were many better modes of establishing the legitimacy of Edward and Nicholas Knollys; and it was a very extraordinary circumstance that Lady Banbury was not examined, as she was the properest person to establish the legitimacy of her own children.

The conduct of Lord Banbury, in the last years of his life, most clearly proved that he was ignorant of the birth of Edward and Nicholas Knollys. The conveyance of Rotherfield Greys, in 1630, to Sir Robert Knollys, who was Lord Banbury's nephew, and next heir male, to whom it would have descended, if Lord Banbury had no son, and the disposition of all his personal estate by his will, were acts which no person having two sons born to him in his old age, could be supposed to have done. And if Nicholas could have proved his legitimacy, it is impossible

to suppose that he would have submitted to the loss of a considerable estate, which being granted as a reward for services, could not be aliened by Lord Banbury, but that he would have taken some steps to recover it, which he never did.

The deed executed by Lord Vaux and Lady Banbury after their marriage, which was acknowledged by Lady Banbury when it was enrolled in Chancery, contained positive proofs, from the manner in which Nicholas was described, that he had first borne the name of Vaux.

The determination of the House of Lords in 1692, that Charles Knollys had no right to the title of Earl Banbury was valid, though not absolutely conclusive on Charles Knollys; and the Court of King's Bench ought to have submitted to it.

The report of Lord Hardwicke in 1727, if it had been known to the Attorney-General, would probably have induced him to make a similar one; and not to recommend a reference to the House of Lords. If *he* had been Attorney-General, he certainly would not, after that report, have recommended a reference.

Lord Eldon contended, that a child born in wedlock might be bastardized by evidence shewing the total impossibility of its being begotten by the husband. And cited a case between the parishes of St. Andrew and St. Bride's, reported by Strange, Vol. I. 51. And the case of Goodright *v.* Saul, 4 Term Rep. 356.

Lord Erskine, in reply, insisted that by the civil and canon law, and also by the law of England, a child born in wedlock could only be bastardized by evidence of non-access, or absolute impotence of the husband; and in this case neither of those facts had been even attempted to be proved. That the legitimacy of such a child was *præsumptio juris, et de jure;* and there was no case in the law of England where the husband had access to his wife, in which the improbability of a child's having been begotten by the husband, however strongly proved, had been held sufficient to bastardize such child.

The following question was proposed to the Judges:—"Whether the presumption of legitimacy arising from the birth of a child during wedlock, the husband and wife not being proved to be impotent, and having opportunities of access to each other, during the period in which a child could be begotten and born,

in the course of nature, can be rebutted by any circumstances inducing a contrary presumption."

The answer of the Judges was:—"That the presumption of legitimacy arising from the birth of a child during wedlock, the husband and wife not being proved to be impotent, and having opportunities of access to each other during the period in which a child could be begotten and born, in the course of nature, may be rebutted by circumstances inducing a contrary presumption."

The following question was then put to the Judges:—"Whether the fact of the birth of a child from a woman, united to a man by lawful wedlock, be always or be not always, by the law of England, *primâ facie* evidence that such child is legitimate. And whether in every case in which there is *primâ facie* evidence of any right existing in any person, the *onus probandi* be always, or be not always, upon the person or party calling such right in question. Whether such *primâ facie* evidence of legitimacy may always, or may not always, be lawfully rebutted by satisfactory evidence, that such access did not take place between the husband and wife, as by the laws of nature is necessary in order for the man to be in fact the father of the child. Whether the physical fact of impotence, or of non-access, or of non-generating access (as the case may be), may always be lawfully proved; and can only be lawfully proved by means of such legal evidence as is strictly admissible in every other case, in which it is necessary by the laws of England that a physical fact be proved."

"Whether evidence may be received, and acted upon to bastardize a child born in wedlock, after proof given of such access of the husband and wife, by which according to the laws of nature, he might be the father of such child, the husband not being impotent; except such proof goes to negative the fact of generating access.

"Whether such proof must not be regulated by the same principles as are applicable to the legal establishment of any other fact."

The Judges answered:—"That after proof given of such access of the husband and wife, by which, according to the laws of nature, he might be the father of the child (by which they understood proof of sexual intercourse between them), no evidence could be received, except it tended to falsify the proof that such intercourse had taken place. Such proof must be regu-

lated by the same principles as were applicable to the establishment of any other fact."

Afterwards the following questions were put to the Judges:— 1. "Whether, in every case where a child is born in lawful wedlock, sexual intercourse is not by law presumed to have taken place, after the marriage, between the husband and wife (the husband not being proved to be separated from her by sentence of divorce), until the contrary is proved, by evidence sufficient to establish the fact of such non-access, as negatives such presumption of sexual intercourse, within the period when, according to the laws of nature, he might be the father of such child. 2. Whether the legitimacy of a child born in lawful wedlock (the husband not being proved to be separated from his wife by sentence of divorce) can be legally resisted, by the proof of any other facts or circumstances, than such as are sufficient to establish the fact of non-access, during the period within which the husband, by the laws of nature, might be the father of such child. And whether any other question but such non-access can be legally left to a jury, upon a trial in the courts of law, to repel the presumption of the legitimacy of a child so circumstanced."

The answer was, 1. "That in every case where a child is born in lawful wedlock, the husband not being separated from his wife by a sentence of divorce, sexual intercourse is presumed to have taken place between the husband and wife, until that presumption is encountered by such evidence as proves, to the satisfaction of those who are to decide the question, that such sexual intercourse did not take place at any time when by such intercourse the husband could, according to the laws of nature, be the father of such child.

2. "That the presumption of the legitimacy of a child born in lawful wedlock, the husband not being separated from his wife by sentence of divorce, can only be legally resisted by evidence of such facts or circumstances as are sufficient to prove to the satisfaction of those who are to decide the question, that no sexual intercourse did take place between the husband and wife, at any time when, by such intercourse, the husband could, by the laws of nature, be the father of such child. Where the legitimacy of a child in such a case is disputed, on the ground that the husband was not the father of such child, the question to be left to the jury is, whether the husband was the father of such child;

and the evidence to prove that he was not the father, must be of such facts and circumstances as are sufficient to prove, to the satisfaction of a jury, that no sexual intercourse took place between the husband and wife, at any time when by such intercourse the husband, by the laws of nature, could be the father of such child.

" The non-existence of sexual intercourse is generally expressed by the words, ' non-access of the husband to the wife ;' and we understand those expressions, as applied to the present question, as meaning the same thing. Because, in one sense of the word *access*, the husband may be said to have access to his wife, as being in the same place, or the same house, and yet under circumstances, as, instead of proving, tend to disprove that any sexual intercourse took place between them."

The case was again argued by the Lords, in the Committee of Privileges in 1812; and Lord Erskine contended, upon the authority of the answers of the Judges, that the claimant was entitled to the dignity.

The case was adjourned to the next sessions, when Lord Eldon in the Committee of Privileges delivered his opinion against the claim, of which the following is a very imperfect note made by the late Mr. Litchfield.

" If the House can convince itself that Nicholas the claimant's ancestor was not *de facto* the child of William Earl of Banbury, we ought to see whether he was so *de jure*. The House in 1692 came to the resolution that the then petitioner, claiming under Nicholas, had not any right to the title of Earl of Banbury. It is to be lamented that we did not come to some resolution declaring the resolution of 1692 to be a bar to the present claim, which is not supported by any additional evidence. Sir Jeffry Palmer appears, by the imperfect minutes preserved, to have acceded to the proposition, that the legitimacy of Nicholas was maintainable by law. I have looked back to the year books, and find nothing to confirm this opinion. The inquisition of Sir Francis Knollys, the father of the Earl of Banbury, seems to have been totally overlooked in 1661, and in the subsequent proceedings. It is now for the first time before the House. It recites a settlement (page 169, of the printed minutes) of a great part of his estates, but particularly Caversham and Cholsey, to descend in the name and blood of Knollys. This was in 1595 ;

and the same anxiety was shewn by William his son in 1606, upon his marriage with Lady Elizabeth Howard (page 7. of the printed minutes). The settlement has these words:—" For the continuance of all and singular the manors, &c. in his name and blood." And the same lands of Caversham and Cholsey are covenanted to descend, in failure of heirs male of the body of him William then Lord Knollys, by Lady Elizabeth Howard, to the use and behoof of the heirs male of the body of Sir Francis. So that the inquisition and preceding settlement of 1595 must be looked at together, and at the same time with the settlement of 1606. Referring to the inquisition and former settlement, there was every motive in 1606, to see what should be the future state of the family; he might cut off the entail, but she could not. This settlement of 1606 appears to have been carefully concealed in 1661, and during the subsequent proceedings in this case: yet it must have been produced to the jurors on their inquisition in 1633; for the Crown, on whose behalf such inquisition was made, could draw out of the hands of parties the deeds affecting the interests of the Crown.

" At the time of this inquisition in 1633, the Countess was already the wife of Lord Vaux, being so described on the 2d of July in the year preceding the date of it. She must have been privy to the inquisition; for the jurors find her living at Caversham, and the deeds to which they had recourse were necessarily in her custody. Why did she not produce the children Edward and Nicholas at that time, when, protected by her second husband, she might have boldly avowed their birth?

" Of all persons named in the pedigree the birth is proved, but not of Edward and Nicholas. An annuity is directed in the patent creating William Earl of Banbury, to be paid out of the exchequer, which was never claimed by Nicholas. In short all proceedings are studiously avoided in which the Crown was immediately interested; for the truth must have come out if such questions had arisen.

" The message to the Lords in 1628, was the legitimate cause of all that happened afterwards. The earl acted up to the main declaration in that message, namely, that he was childless; not only in the conveyances of his property, in which he always treated himself as having no issue, but in his last will, in which he makes no provision for any. This will be considered in con-

nection with the preceding conveyances of his estates. He sinks into the grave, having industriously stripped his supposed issue of all that property to which, under solemn settlements, they would have been entitled. And this is the act of a man who had a high hereditary honour to transmit to his posterity.

"It has been asserted by those who have contended for the present claim, that the second inquisition invalidated the finding of the first. But I must say that without very strong legal grounds, the second ought never to have been taken. I will not go the length to say that a traverse, or a *melius inquirendum*, was absolutely indispensable; but it would have been decent to have proceeded upon some grounds legally impugning the validity of the first. If an inquisition be directed in one county, and afterwards in another, as was frequently the case, the main findings must be the same, as to whether any issue left by the parties. *One cannot in this respect contradict the other, without shewing strong grounds for such contradiction.* The examinations of the witnesses in 1661, instead of proving access, go to disprove it. Much better evidence might have been produced in 1661; I mean the evidence of repute. There were six relations nearly allied to the claimant, if he was the person he stated himself to be; and among them three were maternal uncles, then in the House, whose testimony would have been surely of greater value than that of the obscure witnesses who were then produced.

The petitioner had prayed in 1692 to be tried as a peer. If he was a peer, it was his right so to be tried; and it was a regular proceeding, nay the duty of the House, to inquire into the merits of the petition. In consequence of this inquiry, they came to a resolution to dismiss the petition upon a reference to all the former proceedings before the House.

The indictment pending against the petitioner having been removed by *certiorari* into the King's Bench, he pleaded a misnomer in abatement. To this plea Sir John Somers, the then Attorney General, replied that the petitioner ought to answer to the indictment; for that the House had resolved that he was no peer. To this replication the petitioner demurred; and Sir Edward Ward, who in the mean time had become Attorney General, seems to have joined in the demurrer. Lord Holt was of opinion that the replication did not avoid the plea, and quashed

the indictment. Most probably not upon the original question of right, or no right, to the peerage; but upon the insufficiency, according to his opinion, of the replication, which seemed to proceed upon a supposed original jurisdiction of the House in matters of peerage. This left the original question precisely in the situation in which it had stood before the investigation.

Skinner's Rep. The opinion of Lord Holt does not seem to have been acceded to by the rest of the bench. If a writ of error had been argued, the questions growing out of it, might have set the claim for ever at rest.

"The peers who in 1692 negatived the resolution, thought themselves so much bound by this proceeding, that they concurred in 1697 in the address. The president of the council, Lord Carmarthen, afterwards Duke of Leeds, the Marquis of Halifax, Lord Mulgrave, afterwards Marquis of Normanby, the Earl of Marlborough, and Lord Godolphin, were dissentient to the resolution of 1692; yet held themselves bound by it in 1697, and went up with the address."

The Lord Chancellor, after recapitulating the leading parts of the evidence for and against the claim, concluded by saying,—"If any Lord shall vote for the claim upon the ground that Lord Banbury was married to the Countess, and that *pater est quem nuptiæ demonstrant*, he will vote upon mistaken grounds."

Upon a division, the claim was rejected; twenty-one peers having voted against it, and thirteen for it. And the committee resolved that the petitioner was not entitled to the dignity and honour of Earl of Banbury; to which the House agreed.

Earldom of Berkeley, 1811. Printed Case. L'Isle Peerage Case. Appendix III. p. 318. 329.

72. W. Fitzharding Berkeley claimed the earldom of Berkeley, stating that Frederic Augustus Earl of Berkeley died in 1810 leaving the claimant his eldest son and heir; he having been married to Mary, the then Dowager Countess of Berkeley, in 1785; and the claimant being the eldest son of that marriage, was heir male of the body of George first Earl of Berkeley, who was created Earl of Berkeley, to him and the heirs male of his body by letters patent in 31 Cha. 2. The Attorney-General, (Sir V. Gibbs,) reported, That it had been satisfactorily proved before him that the earldom of Berkeley was granted by letters patent to George Lord Berkeley and the heirs male of his body; and that the said dignity descended to the said Frederic Augustus Earl of Berkeley, the father of the petitioner, and had

descended to the petitioner, if he was the lawful eldest son of the said late earl.

That the Dowager Countess of Berkeley had stated to him that she was married to the late earl in March 1785, and that the petitioner was the eldest son of the said late earl and herself, born in 1786.

That a copy of the register of the said marriage, extracted from the register book of the parish of Berkeley, was produced to him.

That, in consequence of some inquiries which this information led him to make, he found that a second marriage had been solemnized between the said late Earl and the then Dowager Countess of Berkeley, on the 16th May, 1796, which was long after the birth of the petitioner.

That a copy of the register of the second marriage, taken from the register book of the parish of Lambeth, was produced to him; and that he was informed that the petitioner had much parol evidence to bring forward for the purpose of explaining the fact of the second marriage, and of establishing the validity of the first.

That under these circumstances, having no power to examine the witnesses who might be called before him; and seeing that without such an examination the validity of the first marriage, upon which the claim of the petitioner altogether depended, could not be brought to a satisfactory decision; he advised his Majesty to refer the petition to the House of Lords.

The petition was accordingly referred to the House of Lords, and the claim heard before the Committee of Privileges, where a great number of witnesses were examined; and the Committee not being satisfied with the proofs of the first marriage, resolved that the claimant had not made out his claim to the dignity of Earl Berkeley, which was confirmed by the House. (*a*)

73. H. F. Hastings petitioned his R. H. the Prince Regent for the earldom of Huntingdon. Upon a reference to the Attorney- July 2, 1811. Earldom of Huntingdon. Printed case.

(*a*) [Mr. Berkeley, the claimant to the earldom, having succeeded to the castle and manor of Berkeley, under the will of the late earl, recently presented a petition to his Majesty, praying to be summoned to parliament as Baron Berkeley, in respect of his tenure of Berkeley Castle. This petition, with the Attorney General's report thereon, was referred to the House of Lords, who do not appear to have come to a decision; but the claimant has since been created Baron Segrave.]

General (Sir Samuel Shepherd) he reported that the said earldom was created by letters patent 21 Hen. 8. advancing George Lord Hastings to that dignity, with limitation to the heirs male of his body; and the petitioner stated that he was entitled to the said earldom, as the surviving heir male of the body of the said George, first Earl of Huntingdon.

That the said George, first Earl of Huntingdon left issue five sons, of whom Sir Francis the eldest succeeded to the earldom, and died leaving six sons Henry, George, William, who died without issue, Sir Edward fourth son, from whom the petitioner was descended, and was heir male of his body, and two other sons. That all the male descendants of Henry and George, the two eldest sons of Sir Francis, the second Earl of Huntingdon, were extinct; by which the said H. F. Hastings was become heir male of the body of the first Earl of Huntingdon.

The report concludes in these words—"Upon the whole of this case I am humbly of opinion that the petitioner has sufficiently proved his right to the title of Earl of Huntingdon; and that it may be advisable to order a writ of summons to the petitioner."

A writ of summons was issued accordingly; and Mr. Hastings took his seat in the House of Peers, as Earl of Huntingdon.

74. [A dignity may also be granted to the heirs male of the grantee for ever, as well as to the heirs male of the body.

75. This is the form of limitation in the patent granting the dignity of the earldom of Devon, which was recently discussed before a Committee of Privileges in the House of Lords.

Earl of Devon's case, 2 Dow & Clarke, App. Cases, 200.

76. Viscount Courtenay, in June, 1830, presented his petition to the King, claiming the earldom of Devon, and his Majesty having first referred the same to the Attorney-General, who made his report thereon, afterwards referred the petition and report to the consideration of the House of Lords. In pursuance of the standing order of the House, the claimant submitted the following statement of his case.

In the first year of the reign of Queen Mary, Sir Edward Courtenay, Knight, (son and heir of Henry Marquis of Exeter, and Earl of Devon, who was attainted and executed in the 31 Hen. 8.) was created Earl of Devon, to hold to him and his heirs male for ever, by a patent, containing the following words:—*Habendum et tenendum nomen, statum, stilum, titulum, honorem,*

et dignitatem Comitis Devonie predicta, cum omnibus et singulis preeminenciis, honoribus, et ceteris quibuscunque hujusmodi statui Comitis Devonie pertinentibus, sive spectantibus prefato Edwardo et heredibus suis masculis imperpetuum. The patent further went on to say that the Queen granted "to the aforesaid now earl, that he and his heirs male may have, hold, enjoy, and possess in all parliaments and other places the same pre-eminence as any of the ancestors of the said earl, being heretofore Earls of Devon, had held or enjoyed." The grantee of this peerage died on the 18th of September, 1556, unmarried. His heir male was Sir William Courtenay, of Powderham, and from him the claimant was lineally descended. The Attorney-General (Sir J. Scarlet) reported that the claimant "had proved himself to be the male descendant of Hugh, second Earl of Devon, and, therefore, according to the pedigree, proved the nearest heir male of Sir Edward Courtenay, who was created Earl of Devon by letters patent of the first of Mary, to hold *sibi et heredibus suis masculis imperpetuum.*" The Attorney-General then added, "Whether under that patent the claimant can establish a title to the dignity of Earl of Devon, is a question of very grave consideration, and, as far as I am informed, has not received any precise determination, on which account, I humbly submit to your Majesty that the claim ought to be referred to the consideration and report of the House of Peers."

When the case came on before a Committee of Privileges, it was argued on the part of the claimant, by Mr. Pepys and Mr. Nicholas, and for the Crown by Sir Thomas Denman, who had in the mean time been appointed his Majesty's Attorney-General.

Lord Brougham, C.—This, my Lords, is a question of much curiosity and importance, whether considered in an antiquarian point of view, or as a matter of legal principle. There is, perhaps, no other case in which the claim to a peerage can be founded on a similar patent. The usual mode adopted in patents of nobility in this part of the kingdom is to make the grant to the first grantee and the heirs male of his body. That mode is sometimes called the creation of a barony in fee, but more properly in fee-tail, for if it were in fee it would be descendible to the heirs general of the grantee. There are other creations by writ of summons, and by the person thus summoned actually

taking his seat in this House. The Crown has also the power of granting patents of nobility in such language as will make them descendible to the female as well as the male heirs of the body of the grantee, but the more ordinary course is to make them descendible only to the male heirs of the body of the grantee. In Scotland, however, a different rule frequently prevails, and the dignity is granted to a man and his "heirs whosoever." In the 21st Richard II. nine peers were created, to all of whom the peerage was limited to "the heirs of their bodies," except only Earl Scrope, who being a particular favourite had the dignity granted to him and his heirs male *imperpetuum;* a circumstance which shows that, though such a grant was not at that time general, it was not unknown. The grant in the present instance is in similar terms, and a more satisfactory proof of pedigree never was given. The only question therefore is, whether by the laws which regulate the descent of honours, this grant carries with it the right of succession in favour of the collateral heirs. If a grant of lands had been made by the Crown in these terms, the grant would have been void, but the argument as to the rule of construction on a grant of lands by the Crown, is not to be imported into this case, which is one of a grant of honours. The difference between the two is manifest; for the rule of construction which would make such a grant of lands void is adopted for the protection of the property of the Crown; but it cannot be said that the same protection is needed in the case of honours, for the Crown does not part with the honours it confers as it does with the land it grants, since it is, as our law-writers term it, the fountain of honours, and a fountain that is inexhaustible. The Crown, therefore, is not injured in its interests by such a grant, for honours are the creation of the Crown, rather than any existent thing transferred by it. The rule of construction applicable to grants of lands has therefore been truly said not to extend to grants of honours, or of armories or arms, which are but a species of honours. The power of the Crown to make such a grant as this, is not denied. That admission rests in the first place on the fact, that grants of a similar kind have been before made. In the next place, on the reason of the thing, such a grant is not objectionable, for it is hardly greater than a grant to the heirs general of a man's body. If the Crown grant a

barony by summons with a seat in Parliament, the dignity will descend to the heirs in tail general, and will therefore vest in females as well as males. Now, if such a dignity should descend to a daughter, she may marry a man of a different family, and the blood of the next taker will only be connected with the original family by a female. The same thing may happen again and again, till at last the dignity gets to such an immeasurable distance from the first family, that it becomes impossible to trace it to the free original stock. I can hardly conceive any thing more from control than this. In the present case, however, the words of the patent limit the descent to the heirs male, so that it can only be vested in the male blood of the family, to the exclusion of all strangers to the grant. As to the power of the Crown to make such a grant, it appears from the authorities that the Crown may grant a peerage for life, and not only for the life of the grantee, but *pur auter vie*. His Lordship then proceeded to make the observations before stated, ch. 2, s. 14, and continued thus :—I now come to the question of the exercise of this power. In the 3rd of Charles I., a peerage that had been granted to a man *et heredibus suis tam de latere quam de corpore* was held good, though that was a limitation that would clearly include collaterals. Upon this subject there seems to be a mistake in the note to Co. Litt. 27 *b*, where the case of Aubrey de Vere, Earl of Oxford, is cited. That case came on in 1 Charles 1, by petition to the Crown, and the resolution on the case was delivered by Croke and others. In the case in Jones's Reports, it is stated that the grant was "by the assent of Parliament" to Aubrey de Vere, in the time of Richard II., of the estate and honours of the Earl of Oxford, and that the King granted and restored the honours. In the note in Co. Litt. it is said that that case was out of the ordinary rules of law, for that the limitation subsisted by authority of Parliament. On examining the case itself it will be found, in the first place, that that was not the principal point; and in the next place, that though the judgment was in the result correct, the arguments on which it was founded were only those of the individual judges, and not of the Court. But besides this, it appears that these peerages, the claim to one of which was then made by a collateral descendant of the grantee, had formerly existed, and had been put an end to by attainders most corruptly procured, many of the

Sup. p. 149.

members of this House having come to the House, and there taken oaths to pass verdicts of guilty on all the accused. Having in this manner, as they thought, duly qualified themselves to pronounce judgment, they attainted several noble persons, alleging as a sufficient defence in morals and religion for what they had done, that they were bound to perform the oath they had taken. The attainder occurred in the 16 Rich. II. and the reversal in the 21st of the same reign. The words in the reversal are *restitué, donné, et grantée per assent de Parliament.* The words *ex assensu Parliamenti,* to be found in this case, do not therefore mean that the grant took effect *ex assensu Parliamenti,* but that it was by this assent that the attainder was reversed. In that sense they are correct and intelligible, for the attainder having passed, could only be reversed by the force of an act of parliament, and the words I have mentioned refer to the attainder, therefore, and not to the grant, which certainly did not require an act of parliament to make it effectual. To the same point may be referred the word *restored,* which is to be found in the case. Croke, therefore, made a mistake when he referred the words *ex assensu Parliamenti* to the grant, in order to show that such a grant could not be made without the authority of parliament, for the act was not necessary for such a purpose, but it was necessary to reverse the attainder, and that is the true reason of these words having been entered on the roll. In the 21st of Rich. II. came the reversal of these unjust attainders; and it is remarkable, that John de Lancaster, against whom one of them had been directed, and who claimed no honours, had the attainder against him reversed, in the very same words as those employed in the case of persons who had peerages. On the grounds which I have thus enumerated, I am of opinion that the claimant in the present case has made out his title, and I shall therefore humbly move your Lordships to that effect.

Lord Wynford, after commenting upon Mr. Justice Doddridge's observations, noticed in a former page, and concurring with Lord Brougham in his strictures on the case of the Earl of Oxford, observed, " The decision of Lord Eldon, in the Annandale case, appears to me to be strongly in point upon the present; but the case of the claim of the earldom of Oxford is amply sufficient for us. In that case the House decided that under a grant to the

P. 149.

taker of the title and his heirs male, Sir Aubrey de Vere, though not descended from the original earl, was entitled. I come, then, to the question, whether the King has the power to make such a grant. I assume that he has; and if he has the power, I ask, has he not exercised it? If the Crown meant that merely the descendants of the body of the last earl should take, would not the same words have been used that are employed in an ordinary patent? The circumstance of the difference in the words shows that a different intention was entertained, and the decisions that have taken place with respect to land, show that these words have a different import from those that are required to create an estate tail. It is clear, however, from another circumstance, that the Crown intended to give more than usual, for not only is the earl to have the precedence that would belong to an Earl of Devon, from the time of his creation, but he is to enjoy precedence as if he took under the creation of the first Earl of Devon; so that without travelling out of the record, it appears to me that there is sufficient to justify us in saying that, in point of law, this claim is fully made out. Upon the question of the pedigree, I have already expressed my opinion, and as I believe that both the fact of the descent from the first Earl of Devon, and the legal effect of the words in the patent, are in favour of the claimant, I can have no hesitation whatever in seconding the motion of my noble and learned friend."

The question was put by the Earl of Shaftesbury, and the claim allowed.

77. It appears from the printed evidence before the committee that Hugh, first Earl of Devon, had five sons; Hugh, second earl, William, Humphrey, Sir Peter, and Sir Philip Courtenay. Edward, the last Earl of Devon, who died without issue, was the last heir male of the body of Hugh, the second earl; William, Humphrey, and Sir Peter, brothers of Hugh, the second earl, died without issue; and from Sir Philip, the youngest brother of Hugh, the second earl, the claimant was lineal heir male of the body of Hugh, the first Earl of Devon, the common ancestor. So that Edward, Earl of Devon, was the heir male of the body of Hugh, the second earl, and the claimant was heir male of the body of Sir Philip, his youngest brother; and consequently the claimant was the heir male of Edward, the last earl, in the collateral line.]

TITLE XXVII.

FRANCHISES.

SECT. 1. *Nature of.*
2. *A Forest.*
10. *A Chase.*
15. *A Park.*
19. *A Free Warren.*
22. *A Manor.*
27. *Rights of the Lord as to Game.*
53. *A Court Leet.*
55. *Waifs.*
59. *Wreck.*
65. *Estray.*
71. *Treasure Trove.*
SECT. 73. *Royal Fish.*
74. *Goods of Felons.*
75. *Deodands.*
78. *A Free Fishery.*
83. *A Hundred.*
85 *Fairs and Markets.*
94. *How Franchises may be Claimed.*
96. *How they may be Lost.*
97. *Reunion in the Crown.*
99. *Surrender.*
100. *Misuser or Abuser.*
104. *Non User.*

SECTION I.

Nature of.

A FRANCHISE is a royal privilege, or branch of the King's prerogative, subsisting in a subject by a grant from the Crown. Formerly grants of royal franchises were so common, that in the parliament held in 21 Edw. 3. there is a petition from the Commons to the King, stating that franchises had been so largely granted in times past, that almost all the lands were enfranchised, to the great *averisement* and *estingsement* of the common law, and in great oppression of the people; praying the King to restrain such grants for the time to come. To which his Majesty answered, that the franchises which should be granted in future should be made with good advisement.

Rot. Parl. Vol. 11. 16.

Franchises are extremely numerous, and of various kinds: but only some of them will here be treated of, which are immediately annexed to, or connected with, real property.

A forest.

2. Tacitus says, the Germans, when not employed in war, passed most of their time in hunting; and Heineccius, who has collected the ancient laws and customs of his countrymen with

De Mor. Ger. c. 15.

great accuracy, states, that the right of hunting was reserved to their princes, and those to whom they communicated that privilege.

Quum ergo jure patrio pleraque αδεσποτα alicujus momenti sint in dominio reip', vel principis. Quin et jus venandi sit penes solos principes, vel eos quibuscum illud communicatum est. Elem. Jur. Germ. lib. 2. No. 82.

3. The Normans, who were a German tribe, introduced this doctrine into England, as appears from some very ancient and respectable authorities. Thus Ordericus Vitalis says of Henry I. *omnem ferarum venationem totius Angliæ sibi peculiarem vindicavit, et vix paucis nobilioribus ac familiaribus privilegium in propriis saltibus, venandi permisit:* and we find the following passage in Mat. Paris, anno 1209. *Rex Anglorum Johannes, ad natale Domini, fuit apud Bristollum, et ibi capturam avium per totam Angliam interdixit.*

4. These regulations were probably made in consequence of some violation of the King's rights respecting game; for Bracton states the royal prerogative in the following words:—*Habet etiam (Rex) de jure gentium, in manu suâ, quæ de jure naturali deberunt esse communia; sicut feras bestias, et aves non domesticos.* Lib. 2. c. 24. And Manwood, upon the authority of this passage, says—"In like manner wild beasts of venery, and beasts and fowls of chase and warren, being things of great excellency, they are meetest for the dignity of a prince, for his pastime and delight; and therefore they do most properly belong unto the King only." Forest Laws, c. 2. s. 1.

5. In consequence of this prerogative, the first monarchs of the Norman line not only reserved to themselves the sole and exclusive property of the ancient forests, but also created others of great extent over the lands of private persons; which they placed under the jurisdiction of particular courts; and enacted laws of the most arbitrary and cruel kind for the preservation of the game therein. 4 Inst. 390.

6. The practice of afforesting the lands of private persons, being highly destructive of their properties, was remedied by the *charta de forestâ*, 9 Hen. 3. which enacted, that all the lands that had been afforested by King Henry II., King Richard I., and King John, except the proper demesnes of the Crown, should be disafforested, and freed from the forest laws. The lands thus disafforested are called purlieus. But though exempted

from the forest laws, so that the proprietors of such districts may occupy them as their freehold, yet, as to some purposes, they have the privileges of a forest.

7. Manwood defines a forest to be "A certain territory or circuit of woody grounds and pastures, known by its bounds and privileges, for the peaceable being and abiding of wild beasts and fowls of forest, chase, and warren; to be under the King's protection, for his princely delight; replenished with beasts of venery and chase, and great coverts of vert for the succour of the said beasts; for preservation whereof there are particular laws, privileges, and offices belonging thereto." Beasts of forests are properly hart, hind, hare, boar, and wolf; but all beasts of venery are equally protected in a forest, for it comprehends within it a chase, park, and free warren.

8. Several of the royal forests were granted by the Crown to great lords, by which they acquired the royal franchise of a forest. Thus in 5 Jac. 1., all the justices and barons held that a forest may well be in the hands of a subject; and shall be used as a forest, if the King gives authority, by express words, for the administration of justice there, and for his justices to come there. And if such grantee might have commission in such case to use, and have officers of a forest, then it should continue a forest in the hands of a subject.

Case of Leicester forest, Cro. Jac. 155.

9. Part of the land and wood comprised in a forest may belong to private persons; but they can only occupy and enjoy it in such manner as is consistent with the rights of the proprietor of the franchise of forest, and the preservation of the game.

4 Inst. 297. Cro. Jac. 155.

A chase.

10. A chase is a franchise or liberty of keeping certain kinds of wild animals within a particular and known district, with an exclusive right of hunting them therein. It is in most respects similar to a forest; the only difference between them being, that a chase has no laws peculiar to it, so that all offences in chases are punishable by the common law, not by the forest laws.

Beasts of chase are buck, doe, fox, martin, and roe, in which the owner of the chase has a property.

11 Rep, 86 a.

11. Where a chase belongs to a subject, it must have been originally created by a grant from the Crown, giving to the grantee the franchise of chase over a certain tract of ground; or by a grant of a royal forest to a subject, but without any words

4 Inst. 314.

enabling him to hold courts; in which case the forest became a chase.

12. Lord Coke says, no King of England could have made a chase for himself in any of the grounds of his subjects. And that when King Henry VIII. determined to make a chase about his palace at Hampton Court, he was obliged to obtain the previous consent of the freeholders, and customary tenants, over whose lands the chase was to extend. 4 Inst. 301.

13. The erection of this chase was confirmed by an act of parliament, 31 Hen. 8. c. 5., which recites the indenture made between the King and the freeholders and customary tenants of the neighbouring townships, in which it was stipulated that they should have liberty to cut their woods within the chase, without the King's licence; and to fence against the deer, while their corn was growing; but that after the corn was carried, the officers of the chase should be allowed to make deer lepes and brekes in the fences, that the deer might enter the ground where the corn had been sown, for their feeding, while the land remained unsown; but that in other respects the proprietors should obey the laws of the chase. And for recompence it was agreed that a third of the rent of the freeholds, and a moiety of the fine of every copyholder, should be deducted. Statutes at large. fol. ed. 1817.

14. It was resolved by all the Judges in 5 Ja. 1. that persons having freehold lands within a royal chase might cut their timber and wood growing there without the view or licence of any; but if they cut so much that there was not sufficient left for covert, to maintain the game of the King, they should be punished. So if a common person had chase in another's soil, the owner of the soil could not destroy all the wood: but must leave sufficient covert and browse, as had been accustomed. Case of forests. 12 Rep. 22. 4 Inst. 298.

15. A park is an inclosed chase, extending over a person's own grounds, privileged for beasts of venery, and beasts of forest and chase, by the King's grant or prescription. And it appears from the *Ordinatio de Libertatibus Perquirendis*, 27 Edw. 1., that those who would purchase a new park should have writs of inquiry out of Chancery, and there make fine for the park having. And in Madox's History of the Exchequer there is an instance of a person being fined forty marks for making a park without the King's licence. A park. 1 Inst. 233. a. 2 —— 199. Vol. I. 557. 4to.

16. To a park three things are neceesary:—1. A grant from 11 Rep. 87. b. Cro. Car. 60.

the Crown. 2. Inclosures by pale, wall, or hedge. 3. Beasts of park, such as buck, doe, &c. And where all the deer are destroyed, it shall no more be accounted a park; which consists of vert, venison, and inclosure; for if it be determined in any of these, it is a total disparking.

17. Manwood says, there are parks in many forests, which are claimed either by grant from the King, or by prescription. That if a subject is owner of a forest, he may give licence to another to inclose a park within the meers of his forest, to hold the same so inclosed, with all such venison as the grantee shall put in, to him and his heirs. But if such park is so slightly inclosed, that the wild beasts of the forest get into it, the lord of the forest may, in that case, enter and hunt there at his pleasure.

4 Inst. 314. 2 —— 198.

18. Parks as well as chases are subject to the common law, and not governed by the forest laws; but by the statute Westm. 1. c. 20. trespassers in parks are made liable to very severe punishments.

A free warren.

19. A free warren is a franchise to have and keep certain wild beasts and fowls called game within the precincts of a manor, or other known place; in which animals the owner of a warren has a property, and consequently, a right to exclude all other persons from hunting or taking them. This franchise, like that of chase, or park, must be derived from a royal grant, or from prescription, which supposes such a grant; it being laid down in the case of monopolies, 44. Eliz.—"That none can make a park, chase, or warren without the King's licence; for that is *quodammodo* to appropriate those creatures which are *feræ naturæ, et nullius in bonis*, to himself, and to restrain them of their natural liberty." And it appears from the *Ordinatio de Libertatibus Perquirendis*, that those who would purchase free warren should make fine for it, in the same manner as for a park.

11 Rep. 87. b.

Ante s. 16.

Gloss. *voce* warrenna.

20. Spelman was of opinion that free warren was introduced into England by the Normans; and it is certain that our monarchs have been in the practice of granting this franchise ever since the Conquest. For in the charter of foundation of Battle-abbey are the following words, *Warrennam propriam in ipsâ leugâ habeat ecclesia; et in omnibus maneriis suis.* And the following is the usual form in which these grants were made:—*Quod ipse et hæredes sui imperpetuum habeant liberam warrennam in omnibus dominicis terris de N. in com. E., dum tamen terræ illæ non sint*

Dugd. Mon. Vol. I. 317.

West. Symb. P. 1. s. 359.

infra metas forestæ nostræ, ita quod nullus intret terras illas ad fugandum in eis, vel aliquid capiendum quæ ad warrennam pertinet, sine licentiâ et voluntate ipsius E., vel hæredum suorum, sub forisfacturâ decem librarum.

21. The most ancient charter of free warren in the Tower is dated 1 John. And it appears from Dugdale's Baronage that, during the reigns of the three first Edwards, an infinite number of grants of this kind were made to the principal nobility, from which Sir W. Blackstone has justly concluded that the sole right of taking and destroying game belonged exclusively to the King; for otherwise he could not grant it to his subjects. 2 Comm. 417.

22. An opinion has however been lately advanced, that by the common law every possessor of land had an exclusive right, *ratione soli*, to all the game thereon. But this is not supported by any authority, and is contradicted by the several acts, which require a certain qualification of property to enable a person to kill the game on his own estate. For if the game did belong to the proprietor of the land, those acts would have been grossly unjust, as taking from the poor man, though not from the rich one, the right of enjoying that which was before his own. Infra, s. 47.

23. The beasts of warren are hares and rabbits; the fowls of warren are pheasants and partridges. And the effect of a grant of free warren is, to vest in the grantee a qualified property in those beasts and fowls, of the above description, that are on the lands comprised in the grant, as long as they remain there, and even after they are hunted out of the warren. And although it is said that a person may have a property in some wild animals, namely, rabbits, *ratione soli*, yet it is admitted that this property is subservient to that of a person having the franchise of free warren, which is *ratione privilegii*, and suspends it; for in that case the property of the wild animals is in the person having the warren, not in the proprietor of the soil. Fitz. N. B. 86. L. note. Sutton v. Moody, 12 Mod. 144. Ld. Raym. 251.

24. The grantee of a free warren acquired also a right to appoint a person to watch over and preserve the game, called a warrener; who is justifiable in killing any dogs, polecats, or other vermin which he finds disturbing or destroying the game. And by the statute 21 Edw. 1. st. 2. intituled *De Malefactoribus in Parcis*, every forester, parker, or warrener, is authorised to kill persons trespassing in forests, parks, or warrens, who resist and refuse to yield themselves. Keilw. 149. b. Cro. Ja. 46.

Hen. 6. p. 28.

25. The Crown does not appear to have ever enjoyed the prerogative of granting free warren to one person over the lands of another. But still a person might have free warren over another's land by prescription.

Rex v. Talbot, Cro. Car. 311.

26. In a case upon a *quo warranto*, the defendant claimed free warren in R. and pleaded that he was seised in fee of the manor of R., whereof the *locus in quo*, &c. was parcel, and so prescribed to have free warren, within all the said manor, and the demesnes thereof, so that none should chase any game in the said manor and the demesnes thereof without his leave. Issue was taken that he and all those whose estate, &c. had no free warren within the said manor and demesnes; and found for the defendant. It was objected that this prescription was not good, *viz.* to have free warren in the manor and in the demesnes of the manor; for though he may prescribe to have it in his own demesnes, yet he could not prescribe to have it in the lands of others his freeholders. To this it was answered by Roll, (counsel for the defendant) that a prescription to have free warren in his manor was good, as well in the lands of the freeholders as in the demesnes. For being by prescription, it should be intended this liberty was before there were any freeholders; whose estates were afterwards extracted out of the demesnes of the manor. No judgment was given: but Roll's doctrine is admitted in several cases stated in Brooke's Ab., and also in a case reported by Bulstrode.

Fowler v. Seagrave, Bulst. 254.

27. Other circumstances might also give rise to a right of free warren over another person's land. Thus a person having free warren over certain lands may alien them, reserving the warren. But if he aliens the lands without the warren, and without reserving it to himself, it is determined and gone; for the alienor has parted with his right to the land, discharged of all things, so that he cannot have it; nor does the alienee take it, because it is not granted to him, but only the land.

Bro. Ab. tit. Warr. 3. Dyer, 30 b. pl. 209.

Bro. Ab. tit. Grant 144. Cro. Eliz. 547.

28. A warren may be appendant to a manor, or in gross; it being said that a warren in gross in a patentee does not pass by a bargain and sale of the manor, for a warren is not parcel of, or any member of a manor: though it may be appertaining by prescription. And in a note in Dyer it is said that there is a difference between a warren used to a manor from time immemorial, and a warren appendant: for in the first case it shall not

306. pl. 209.

pass by a grant of the manor, *cum pertinentiis*, because it is not parcel; whereas in the other it shall pass, but not without the words *cum pertinentiis*.

29. A person may have a warren by prescription in a forest: but in that case there must be an allowance of it in eyre, that is, in the court of the forest, and then a grant is presumed; otherwise not.

30. Thus where Sir R. Harrison claimed a warren, in Windsor forest, at the justice seat, but it not being allowed in eyre, he was fined ten shillings, and the warren was ordered to be destroyed. Harrison's case, W. Jones, 267.

31. Lord Coke says, a man may have a chase as belonging to his manor, in his own woods, as well as a warren or park in his own grounds. For the chase, warren, or park, are collateral inheritances, and not issuing out of the soil, as common does. Therefore if a person has a chase in another's grounds, and purchases the ground, the chase remains. 4. Inst. 318.

32. The origin and general nature of manors has been already stated; and it has been shown that they are feudal seignories, accompanied with royal franchises, their essence consisting in the lord's right to hold a court for the administration of justice; which is part of the King's prerogative, and must therefore have been originally derived from the Crown. A manor. Dissert, c. 3. s. 1, &c.

33. A manor consists of the demesnes, that is, the lands whereof the lord is seised, whether in his own occupation or in that of his lessees for years, copyholders, or customary tenants; together with the wastes; and also of the rents and services reserved upon the grants in fee simple originally made to the tenants, or at any time before the statute *Quia Emptores*, and of the reversion of those parts of the demesnes that were granted out for life or in tail. Bro Ab. tit. Manor, 2.

34. Although the presumption be that the lord of the manor is entitled to the soil of the wastes, situated within the manor, yet any other person may exclude him, by proving acts of ownership. 2 Wooddeson 37.

35. Before the statute *Quia Emptores* a lord of a manor might have granted part of the demesnes to hold of himself, as of his manor, reserving fealty, rent, and suit of court. But if, since that statute, a lord of a manor conveys away a portion of his demesnes in fee, they cease to be a part of the manor, and can never after become parcel of it. Nor can the lord reserve to Dissert. c. 2.

6 Mod. 151. Skin. R. 192. Tit. 10. c. 6. s. 16. Chetwode v. Crew, Willes' R. 614.

himself the ancient services, for the alienee will hold of the next superior lord. And in a modern case, where a lord of a manor conveyed part of the demesnes to a person and his heirs, to hold of the grantor, as of his said manor, by fealty and suit of court, it was resolved that the grantee did not hold of the manor, and was not a freeholder thereof. It is however observable that this was a conveyance in fee simple. Had it been only for life, or in tail, it would have been otherwise.

36. Although the lands which were granted out in fee by the original founder of a manor, to be held of the manor, by fealty, and suit and service to the lord's court, are not parcel of the manor; yet they are comprised within its boundaries, and subject to its jurisdiction, for they originally constituted part of it. And if they escheat to the lord, they again become parcel of the manor. It is the same as to lands granted by lords of manors, prior to the statute *Quia Emptores*.

An. 12 Mod. R. 138.

Rights of the lord as to game. Cowell, Inst. Lib. 2. tit. 2. s. 8.

37. Whenever the Crown granted a tract of land with a jurisdiction, it became a manor, or a *feudum nobile*; and a right of hunting over it followed as a regular consequence, being one of the franchises included in the royalty, in conformity to the general practice then existing upon the continent. For by the customary law of France, every possessor of a fief had a right of hunting over the lands comprised within it. *Qui a fief a droit de chasse* was a maxim there; and appears to have been adopted here, upon the introduction of feuds. (*a*)

Loisel Inst. lib. 2. tit. 2. s. 51.

38. If the right of hunting and killing the game on a manor was not included in the franchise or royalty, it must have remained in the Crown, so that no one could sport there, by which the game must have increased to such a degree as to become a nuisance. The lord's right to hunt and kill the game upon his manor did not, however, give him any property in it before it was killed: that still remained in the Crown; and was, in an infinite number of instances, afterwards conferred on the proprietors of manors, by grants of free chase and warren.

Ante, s. 4.

Ante, s. 21.

39. That the possession of a manor gave a right to hunt over it appears from some of our most ancient law writers. In Kit-

(*a*) *Aucupationes, venationes, et piscationes, cum fundo, transire, nemo unquam dubitavit, ita ut qui feudum accepit, aucupari venari piscari in eo possit, et etiam alium externum prohibere, ne aucupandi, venandi, aut piscandi, causâ ingrediatur.* Craigii Jus Feudale, lib. 2, tit. 8. s. 7.

chin's Jurisdictions, first published in 1580, under the title Charge in Court Baron, is the following passage:—"Also, if any trespass be made in any demesne of the lord, that is to say, in the corn, grass, meadows, pastures, woods, hedges, or waters; or if any hawk or hunt within the demesnes of the lord, without his licence, or within his warren, these are presentable." And in Wilkinson's Office of Coroners and Sheriffs, first published in 1618, in the charge to a homage of a court baron, is the following passage:—"And if any man hath fished, hawked, or hunted within this lordship, without the leave or licence of the lord of this manor, you must present him; for they are the lord's royalties, and therefore no man can lawfully come here to do either one or the other without his leave." Now if the lord could license a stranger to hunt and hawk in his manor, he must necessarily have had that right himself; and that lords of manors had those rights appears to have been acknowledged by various acts of parliament.

40. Thus by the statute 23 Eliz. c. 10. s. 2. (*a*) it is enacted that no manner of persons shall take or destroy pheasants or partridges in the night time, upon pain of forfeiture for every pheasant twenty shillings, and for every partridge ten shillings: one half of the said forfeitures to be to the chief lord or lords of the liberties, lordships, or manors, upon which the same shall be so taken or killed, and the other moiety to the informer. From which it may be inferred that the lords of manors were then deemed to have some kind of right to the pheasants and partridges upon their manors. 9 Geo. 4. c. 69.

41. By the statute 22 and 23 Cha. 2. c. 25. (*b*) reciting that divers disorderly persons had betaken themselves to the stealing and killing of conies, hares, pheasants, and other game, to the great prejudice of noblemen, gentlemen, and lords of manors, and other owners of warrens; (*c*) it is enacted that all lords of manors and other royalties, not under the degree of an esquire, may, by writing under their hands and seals, authorize one or more gamekeepers within their respective manors to take all guns, bows, greyhounds, setting-dogs, &c. and the same to de-

(*a*) Repealed by stat. 1 & 2 Will. 4. c. 32.

(*b*) Repealed by the 1 & 2 Will. 4. c. 32.

(*c*) The word *warren* here means a rabbit warren, not a free warren. *Vide* s. 4 of this statute.

tain and keep for the use of the lord of the manor or royalty where the same shall be found. From which it may be concluded that every lord of a manor had then some right to the game on it; for otherwise it cannot be supposed that he would be at the expense of maintaining a gamekeeper for its preservation.

9 Geo. 4. c. 69. s. 2.

42. By the statute 4 & 5 Will. and Mary, c. 23. (a) s. 4. all lords of manors, or other royalties, or any other persons authorized by them as gamekeepers, shall and may, within their respective manors or royalties, oppose and resist such offenders against the game laws in the night time, in the same manner, and be equally indemnified for so doing, as if such fact had been committed within any ancient chase, park, or warren.

43. By the statute 5 Ann. c. 14. s. 4. justices of peace and lords and ladies of manors are authorized to take hares, pheasants, and partridges, from any higgler and unqualified person; and also dogs, nets, or other engines for the taking of game, found in the custody of persons not qualified to keep the same. And it is further enacted, that it shall and may be lawful for any lord or lady of his or her respective lordship or manor, by writing under his or her hand and seal, to empower his or her gamekeeper or gamekeepers, upon his or their own lordship or manor, as aforesaid, to kill hare, pheasant, partridge, or any other game whatsoever, for the use of such lord or lady only.

Now it would be perfectly absurd to suppose that the Legislature should enable the lord or lady of a manor to confer on their gamekeeper a right which they themselves did not possess.

4 Comm. 174. and see 2 & 3 Will. 4. c. 32. ss. 10. 13.

44. It follows from these statutes, that every lord of a manor always had, and still has, a right to hunt and shoot over the demesnes of his manor, though he may not have any of the qualifications required by the game laws; and this doctrine was fully admitted in the following case:

Mallock v. Eastly, 7 Mod. R. 482.

45. In a prosecution for a penalty under the game laws, the case was, that a person who was lord of a manor, of which the demesnes were leased out for 99 years, at a rent of 15*l.* killed a pheasant out of his manor. It was contended for the plaintiff

(a) Repealed by Statute 2 & 3 Will. 4. c. 32, by which the sale of game is authorized, under certain restrictions.

that the defendant had not a qualification of 100*l.* a year; and was therefore liable to the penalty.

Serjeant Eyre, for the defendant, said that every lord of a manor was qualified to kill game. The proprietors of manors generally were barons, and the manor itself composed of demesnes and a court baron. That the property of a manor, dismembered of its rents and services, was still considered as a royalty, so favoured as to entitle its master to many privileges; and among the rest to that of killing game. With manors, the Crown usually granted free warrens; and though many statutes have been made to preserve the game, under severe penalties, yet lords of manors had been always considered as privileged persons, and qualified to destroy game. That if by statute lords of manors might authorize gamekeepers to kill game, and to seize guns, &c. it would be absurd to say that the lord of the manor had not such power himself; for it would be degrading him below the privileges of his servant;—and why did the statutes authorize them to make gamekeepers to preserve the game, unless they themselves had an interest in it, and power to take and destroy it, and seize the guns, &c. of unqualified persons? If the lord of a manor killed game out of his manor, he was liable to an action of trespass, but not to the penalty inflicted by the statutes. All the treatises upon the game laws mentioned lords of manors to be qualified to kill game; and as this was a penal law, and made for the benefit of lords of manors, it must be construed beneficially for the defendant. Lord Chief Justice Willes said—"If the defendant was not qualified, as being a lord of a manor, he certainly was not so by his estate. But he had some doubt whether the defendant, as lord of a manor simply, was not qualified to kill game within his own manor. It seemed a little odd that the servant of a lord of a manor might kill game, and yet the lord himself not do it, without being punished by a penalty." 1 Eden. 333.

Mr. Justice Abney said, there were three qualifications in force; one of which every man must have to be entitled to kill game. The first was lords of manors, who have not a general qualification to kill game every where, but are confined to the precincts of their own manors; so that it should be considered whether the defendant had not incurred the penalty, as he killed the pheasant out of his manor. The second sort of persons

were those who had titles, as esquires, &c. These were qualified to kill game, whether they were possessed of lands or not. The third sort were persons having estates; and he was quite satisfied that the estate of the defendant would not qualify him.

Mr. Justice Burnett was clear that the estate was no qualification, but had some doubt as to the other point: for though he imagined that the lord of a manor was entitled to kill game within his manor, as well as his gamekeeper, yet he thought he would be liable to the penalty, if he used a gun to destroy game out of the boundaries of his manor. And here it was expressly found that he killed the pheasant out of his manor. No judgment was given. But it appears quite clear from the reasoning of the judges, that if the defendant had killed the pheasant on his own manor, the Court would have held that he was not liable to the penalty, notwithstanding his want of a qualification of property.

46. The lord's right of hunting must have extended over all the lands situated within the manor, and held of it; for it should be presumed, that upon every conveyance of a parcel of the demesnes, for an estate of freehold, to be held of the lord, as of his manor, the lord reserved to himself the franchise of hunting, with a right of entry for that purpose, as is now usually done in all leases for lives, or years; or that his right continued without any such reservation. From all which it seems to follow, that where the proprietor of a freehold estate, situated within the manor, holds of the lord by fealty and suit of court, he cannot exclude the lord from hunting over it.

47. With respect to those parts of the manor which have been alienated by the lord subsequent to the statute *Quia Emptores,* as no tenure could be reserved, they ceased to be held of the manor, and consequently the lord could not claim any franchise over them; so that his right of hunting there was at an end, and devolved on the next superior lord, (*a*) or else the game became the property of the Crown. But the new acquirers presuming upon the ignorance or negligence of the next superior lord, or of the King's officers, exercised the right of hunting over them; from whence probably arose the early statutes requiring a qualification of property, to enable persons to kill

Ante, s. 22.

(*a*) This is a conjecture; for I have not found any authority to show that a person, having a seignory in gross only, could hunt over the lands thus held of him.—*Note by Mr. Cruise.*

game; in order to restrain this right to those of some opulence and respectability.

48. In the reign of Queen Anne, it appears to have been held, by some of the judges, that a lord of a manor could not enter on the freehold estate of another, though situated within the bounds of his manor, for the purpose of hunting. Thus in a case in 5 Ann. Serjeant Darnel *arguendo*, said that the lord of a manor might shoot game any where within his manor, upon any man's freehold in the manor; (*a*) which both Holt and Powell denied, unless he had some other special privilege; and would not suffer him to insist on the point. It does not however appear that this question has ever been argued or adjudged; so that it rests entirely on the above *dictum.* (*b*) Nor is any distinction there made between lands held of the manor by fealty and suit of court, and lands dismembered from the manor, by alienations in fee simple, but situated within its ancient bounds.

Keeble *v.* Hickeringall, Holt's Rep. 14. S. C. 11 Mod. 74.

Ante, s. 47.

49. As to copyhold estates, they still form a portion of the demesnes of the manor of which they are held; and therefore I presume that the lord has a right to hunt over them, unless barred by nonuser. For, considering the original baseness of the tenure, it cannot be supposed that the lord relinquished that royalty over those lands, or that a right of hunting could have been given to a mere villein. It is, however, very extraordinary that this point has never been settled.

50. The lord of a manor may erect a dovecote *de novo*, on his land, being parcel of the manor, and store it with pigeons.

5 Rep. 104 b. Co. Cop. s. 31.

51. It has been held in a late case, that the lords of reputed manors have the same franchises as if the services still existed; from which it follows, that they have all the same rights, respecting game, as their predecessors had, while the manor was perfect. And this doctrine appears to have been generally admitted in modern times.

Soane *v.* Ireland, 10 East. 259.

52. There are a variety of other franchises usually annexed to manors; the principal of which are the right to hold a court leet; to have waifs, wrecks, estrays, treasure trove, royal fish, goods of felons, and deodands, all which were originally granted by the Crown to the persons possessed of those manors, and became appendant to them.

(*a*) In 11 Mod. 74. the Serjeant is made to say the contrary. *Note to former edition.*

(*b*) [See Stat. 2 & 3 Will. 4. c. 32. ss. 10. 13.]

A court leet.

53. A court leet is a court of record, having the same jurisdiction within some particular precincts, as the sheriff's tourn has in the county. It is not necessarily incident to a manor, like a court baron, but is derived from the sheriff's tourn, being created by a grant from the Crown to certain lords of manors, for the ease of their tenants, in order that they might administer justice to them at home.

Colebrooke v. Elliot, 3 Burr. 1859.

54. To every court leet is annexed the view of frank pledge, which means the examination or survey of the frank pledges, of which every man, not particularly privileged, was anciently obliged to have nine, who were bound that he should always be forthcoming to answer any complaint.

Waifs.

55. Waifs are goods that have been stolen and waived, or left by the felon, on his being pursued, for fear of apprehension. Thus, if a felon, who is pursued, waives the goods, or thinking that he is pursued, flies away, and leaves the goods behind him, the King's officers, or the bailiff of the lord of the manor, having the franchise of waif, may seize the goods, to the King's or the lord's use, and keep them, unless the owner makes a fresh pursuit after the felon, and sues an appeal of robbery within a year and a day, or gives evidence against him, whereby he is attainted, &c. in which case the owner shall have restitution of his goods so stolen and waived.

Foxley's case, 5 Rep. 109.

5 Rep. 109 a.

56. The reason that waifs are forfeited, and that the person from whom they were stolen shall lose his property in them, is on account of his default in not making fresh suit to apprehend the felon, for which the law has imposed this penalty on the owner.

3 Hawk. P. C. 450.

57. Though waif is generally spoken of goods stolen, yet if a person be pursued with hue and cry, as a felon, and he flies, and leaves his own goods, these will be forfeited as goods stolen. But they are properly fugitive's goods, and not forfeited till it be found before the coroner, or otherwise by record, that the owner fled for the felony.

5 Rep. 109 a.

58. If the thief had not the goods in his possession when he fled, there is no forfeiture; for if a felon steals goods, hides them, and afterwards flies, there is no forfeiture. So where he leaves stolen goods any where with an intent to fetch them at another time, they are not waived. And in these cases the owner may take his goods where he finds them.

Cro. Eliz. 694.

59. Wreck signifies such goods as are cast upon land after a ship has been lost; for they are not wrecks as long as they remain at sea, within the jurisdiction of the admiralty. And by the statute of Westminster I. 3 Edw. 1. c. 4. it is enacted, that where a man, or any living creature, escapes alive out of a ship that is cast away, whereby the owner of the goods may be known, the ship or goods shall not be a wreck. Wreck. Constable's case, 5 Rep. 106. 2 Inst. 166.

60. If a ship is pursued by an enemy, and the mariners come ashore, leaving her empty, and she comes to land without any person in her, yet she is not a wreck, but shall be restored to the owners. Id. 167.

61. By the common law all wrecks belong to the King, in consequence of the dominion he has over the seas; for being sovereign thereof, and protector of ships and mariners, he is entitled to the derelict goods of merchants; and this is the more reasonable, as it is a means of preventing the barbarous custom of destroying persons who, in shipwrecks, approach the shore, by removing the temptation to inhumanity. This right however may, and often does, belong to lords of manors, having the franchise of wreck, by grant from the Crown, or by prescription. Id. Cases and Opinions, Vol. II. 452.

62. The right to wreck is confirmed by the statute of Westminster I. which enacts, that where the ship or goods are deemed a wreck, they shall belong to the King; and be seised by the sheriffs, coroners, or bailiffs; and shall be delivered to them of the town, who shall answer before the justices of the wreck belonging to the King. And where wrecks belong to another than the King, he shall have it in like manner. 2 Inst. 166.

63. Flotsam is where a ship is sunk, or otherwise perished, and goods float on the sea. Jetsam is, when a ship is in danger of sinking; and to lighten her, the goods are cast into the sea, and afterwards the ship perishes. Lagan, or rather ligan, is when the goods are so cast into the sea, and afterwards the ship perishes; and such goods are so heavy that they sink to the bottom; and the mariners, to the intent to have them again, tie to them a buoy or cork, or such other thing as will not sink, so that they may find them again; *et dicitur ligan a ligando.* But none of these are called wreck, as long as they remain in or upon the sea: if, however, any of them be carried on shore by the sea, they will then be deemed wreck. 5 Rep. 106 a.

64. If a person has a right, either by grant or prescription, to An. 6 Mod. 149.

wreck thrown upon another's land, he has, of necessary consequence, a right of way over the same land to take it; and the very possession of the wreck is in him that has such right before any seizure.

Estray. Finch 177.

65. An estray is a beast that is tame, found within a manor, and owned by no one, in which case if it be proclaimed according to law, at the two next market towns, on two market days, and is not claimed by the owner within a year and a day, it becomes the property of the lord of the manor, if entitled to this species of franchise.

Bro. Ab. Estray. 12 Rep. 101. contra.

66. If the beast strays into another manor within the year, after it has been an estray, the first lord cannot retake it; for till the year and day be past, and proclamations made, he has not acquired a property in it; therefore, the possession of the second lord is good against him.

1 Roll. Ab. 879.

67. If the beast be not regularly proclaimed, the owner may take it at any time. And where a beast is proclaimed, as the law directs, if the owner claims it within the year and day, he shall have it again, upon paying for its keep.

5 Rep. 108 b.

68. If the beasts of an infant, feme covert, or person in prison, or beyond sea, stray into a manor, and are proclaimed according to law; if none claim them within a year and a day, they shall be all bound, and become the property of the lord.

1 Roll. Ab. 188.

69. If any animal belonging to the Crown strays into the manor of a subject, it will not be liable to forfeiture; for the grant of the King cannot be supposed to intend farther than his prerogative, which is to take the cattle of common persons.

Cro. Ja. 148.

70. A beast estray is not to be used in any manner, except in case of necessity, as to milk a cow; but not to ride a horse.

Treasure trove. 2 Inst. 577. 3 —— 132.

71. Treasure trove is where any money, or gold or silver, is found hid, and no one knows to whom it belongs; in which case it becomes the property of the lord of the manor having this franchise. But if the owner may any ways be known, it belongs to him. As to the place where the finding is, it seems not material whether it be hidden in the ground, or in the roof or walls, or other part of a castle, house, outbuildings, ruins, or elsewhere.

Id.

72. Nothing is said to be treasure trove but gold and silver; and it is the duty of every person who finds any

treasure of this kind to make it known to the coroners of the county; for the concealment of it is punishable by fine and imprisonment. 2 Hawk. P. C. 67.

73. Royal fish consist of whale and sturgeon, to which the King, or those entitled to this franchise by grant from the Crown, or by prescription, have a right; when either thrown on shore, or caught near the coast. Royal fish. Cinque Ports, Lord Warden of v. Rex, 2 Hag. (Adm.) 438.

74. Goods of felons, who fly for felonies, are forfeited to those lords of manors who have royal franchises, when the flight is found on record. These are usually called goods of persons put in *exigent*; for where a person is appealed or indicted of felony, and withdraws or absents himself for so long a time that an *exigent* is awarded against him, he forfeits all the goods and chattels which he had at the time of the *exigent* awarded, although he renders himself on the *exigent*, and is acquitted. Goods of felons. 5 Rep. 110. b.

75. Where a person comes to a violent death by mischance, the animal or thing, which was the cause of his death, becomes forfeited, and is called a deodand; as if given to God, to appease his wrath. This forfeiture accrues to the King, or to the lord of the manor, having this franchise by grant from the Crown, or by prescription. Deodands. Hale P. C. c. 32. 1 Salk. 220.

76. If the person wounded does not die within a year and a day after receiving the wound, nothing will be forfeited; for then the law does not consider the wound to have been the cause of the person's death. But if the person dies within that time, the forfeiture shall have relation to the time when the wound was given; and cannot be saved by alienation, or other act whatever in the mean time. Hawk. P. C. c. 67. s. 7.

77. Nothing can be forfeited as a deodand, nor be seised as such, till found by the coroner's inquest to have caused the death of the person. But after such inquisition the sheriff is answerable for the value of it, and may levy the same on the vill where it fell; therefore, the inquest ought to find its value. Idem. s. 8.

78. A free fishery, or exclusive right of fishing in a public river, is a royal franchise which is now frequently vested in private persons, either by a grant from the Crown, or by prescription. This right was probably first claimed by the Crown upon the establishment of the Normans here, and was deemed an usurpation by the people; for by King John's *Magna Charta* A free fishery.

it is enacted that where the banks of a river had been first defended in his time, they should be laid open. And in the
2 Inst. 29. Charter of King Henry III. c. 16, it is enacted that no banks shall be defended from thenceforth but such as were in defence in the time of King Henry II. by the same places, and the same bounds as they were wont to be in his time. And although it is said in the Mirror that this statute is out of use, yet Sir W.
2 Comm. 39. Blackstone observes that in consequence of it, a franchise of free fishery ought now to be at least as old as the reign of King Henry II.

Hargrave's tracts, 19. 79. It is laid down by Lord Hale in his treatise *De Jure Maris* that though *primâ facie* an arm of the sea be, in point of propriety, the King's, and common for every subject to fish there; yet a subject may, by usage, have a several fishery there, exclusive of that liberty which otherwise of common right belongs to all the King's subjects. And this doctrine is confirmed by the following case.

Carter *v.* Murcot. 4 Burr. 2162. 80. An action of trespass was brought by the plaintiff for entering his close, called the River Severn. The defendant pleaded that it was a navigable river; and also that it was an arm of the sea, wherein every subject had a right to fish. The plaintiff, without traversing these allegations, replied, that this was a part of the manor of Arlingham: that a Mrs. Yates was seised of that manor, and prescribed for a several fishery there.

Issue being joined thereon, a verdict was found for the plaintiff. On a motion in arrest of judgment, on the ground that an exclusive right could not be maintained by a subject, to fish in a river that was an arm of the sea, the general right of fishing in a navigable river, or arm of the sea, being common to all.—Lord Mansfield said, the rule of law was uniform. In rivers not navigable, the proprietors of the land had the right of fishery on their respective sides; and it generally extended *ad filum medium aquæ*. But in nagivable rivers the proprietors of the land on each side had it not; the fishery was common; it was *primâ facie* in the King, and was public. If any one claimed it exclusively, he must show a right. If he could shew a right by prescription, he might then exercise an exclusive right; though the presumption was against him, unless he could prove such a prescriptive right. Here it was claimed and found. It was therefore consistent with all the cases that the plaintiff might have an

exclusive privilege of fishing; though it were an arm of the sea. Such a right should not be presumed, but the contrary, *primâ facie;* it was however capable of being proved, and must have been so in this case. The rule was discharged.

81. Sir W. Blackstone says that a right of free fishery does not imply any property in the soil, in which respect it differs from a several fishery. And that from its being an exclusive right, it followed that the owner of a free fishery had a property in the fish before they were caught. Mr. Hargrave, however, observes that both parts of this description of a free fishery seem disputable; and that though, for the sake of distinction, it might be more convenient to appropriate free fishery to the franchise of fishing in public rivers, by derivation from the Crown; and though, in other countries, it may be so considered, yet, from the language of our books, it seemed as if our law practice had extended this kind of fishery to all streams, whether private or public; neither the Register nor other books professing any discrimination. That in one case the Court held free fishery to import an exclusive right, equally with several piscary, chiefly relying on the writs in the Register 95 *b.* But this was only the opinion of two judges against one, who strenuously insisted that the word *libera ex vi termini* implied common. That many judgments and precedents were founded on Lord Coke's so construing it. That the dissenting judge was not wholly unwarranted in the latter part of his assertion, appeared from two determinations, a little before the case in question. To these might be added the three cases cited by Lord Coke, as of his own time. And there were passages in other books which favoured the distinction.

2 Comm. 40.

1 Inst. 122. a. n. 7.

Smith *v.* Kemp, 2 Salk. 637.

Upton *v.* Dawkin, 3 Mod. 97. Peak *v.* Tucker, Carth. 286. Margin.

82. It is laid down by Lord Ellenborough, in a modern case, that the erection of weirs across rivers was reprobated in the earliest periods of our law. They were considered as public nuisances, were treated as such by *Magna Charta* and subsequent acts, which forbid the erection of new ones, and the enhancing, straitening, or enlarging of those which had aforetime existed. That the stells erected in the river Eden by Lord Lonsdale and the Corporation of Carlisle, whereby all the fish were stopped in their passage up the river, were pronounced to be illegal, and a public nuisance. The Court also held, that where a weir had formerly been made of brushwood, through which it was possi-

Weld *v.* Hornby, 7 East, 195.

ble for the fish to escape into the upper part of the river, it could not be converted into a stone weir, whereby the possibility of escape was debarred; though, in flood times, the fish might still overleap it. And however twenty years' acquiescence might bind the parties, whose private rights only were affected, yet the public had an interest in the suppression of public nuisances, though of longer standing.

A hundred
2 Roll. Ab. 73.
1 Vent. 403.
2 P. Wms. 399.

83. A hundred is a franchise consisting of a right to hold a hundred court or wapentake, which of common right belongs to the King; but a subject may have it by grant from the Crown, or by prescription.

Ailesbury *v.* Pattison,
1 Doug. R. 28.

84. It was resolved in a modern case, that the lord of a hundred or wapentake had not the power of granting a deputation to a gamekeeper. Lord Mansfield said, that though in the statute 22 & 23 Cha. 2., the words *other royalties* are used, yet that must mean royalties of the same nature. If royalties of a higher nature had been meant, the statute would have begun with them. The reason why this word was used in the act of Charles II. was, because such royalties go by different names in different parts of the kingdom, as honours, baronies, fees, &c. But in the act of 5 Ann. c. 14. the words are only lordship or manor; and the acts of 9 Ann. and 3 Geo. 1. recite the others, and only mention lords and ladies of manors.

Fairs and markets.

85. Another franchise frequently annexed to a manor is the right of holding a fair, or market, which is derived from the royal prerogative in the same manner as other franchises. But where the King grants a patent for holding a fair or market, it is usual to have a writ of *ad quod damnum* executed and returned; for though fairs and markets are a benefit to the public, yet too great a number of them may become a nuisance; and if the patent be found to be *ad damnum* of the neighbouring markets, it will be void.

Rex *v.* Butler,
2 Vent. 344.
3 Lev. 222.

1 Roll. Ab. 140.
Fitz. N. B. 184. note.
Yard *v.* Ford,
2 Saund. 172.

86. If a person levies a fair or market in a vill next to one in which a fair or market has been long held, to be on the same day, by which the ancient fair or market is impaired, it is a nuisance. And if a new market be erected without patent in a town, near one where there is an ancient market, it may be a nuisance, though holden on different days.

Holcroft *v.* Heel, 1 Bos. & Pul. 400.

87. Where a grantee of a market, under letters patent from the Crown, suffered another to erect a market in his neighbour-

hood, and to use it for the space of twenty-three years, without interruption, it was adjudged, that such user operated as a bar to an action on the case for a disturbance of his market. Vide 2 Saund. R. 175 a note.

88. Where the King grants a fair or market, the grantee shall have, without any words to that purpose, a court of record, called the Court of Piepowders, as incident thereto; because it is for the advancement and expedition of justice, and for the support and maintenance of the fair or market. 2 Inst. 220. 4 —— c. 60.

89. Owners and governors of fairs and markets are to take care that every thing be sold according to just weight and measure. For that and other purposes they may appoint a clerk of the fair or market, who is to mark and allow all such weights; and for his duty therein is entitled to just and reasonable fees. Idem, c. 61.

90. A right of taking toll is usually annexed to a fair and market, though in many instances no toll is due; in which case it is called a free fair or market; for toll is not of right incident to a fair or market, and can only be claimed by special grant from the Crown, or by prescription; and if the toll be unreasonable, the grant will be void. 2 Inst. 19. Heddy v. Wheelhouse, Cro. Eliz. 558.

91. By the statute of Westm. 1. c. 1., it is enacted, that where persons take outrageous toll, contrary to the common custom of the realm, in market towns, if they do so in a town belonging to the Crown, the King may seise the franchise into his own hands; and if it be in the town of a subject, and the same be done by the lord of the manor, the King shall do in like manner. 2 Inst. 219.

92. Where the King grants a fair generally, the grantee may hold it where he pleases, or rather where it can be most conveniently held; and if granted to be held in a town, he may hold it in any place in such town. Dixon v. Robinson, 3 Mod. 107.

93. Queen Elizabeth granted by charter to Henry Curwen, lord of the vill and manor of Workington, that he and his heirs might hold, within the said vill, a market every Wednesday for ever. By another charter of the 2 Ja. 2., reciting the former charter, and that the market thereby granted had not for many years been used, the King proceeded to grant, ratify, and confirm, the same to Henry Curwen, Esq. and his heirs, in the same words, and in as ample a manner as before, *infra villam de Workington.* Curwen v. Salkeld, 3 East. 538.

The question was, whether the lord of the manor had a right

to remove the market-place from one situation to another, within the precincts of the vill of Workington.

Lord Ellenborough.—"If the lord have a grant of a market within a certain place, though he have at one time appointed it in one situation, he may certainly remove it afterwards to another situation, within the place named in his grant. This was long ago settled in Dixon *v.* Robinson; and in modern times has been acted upon in the case of Manchester market. There is nothing in reason to prevent the lord from changing the place, within the precinct of his grant; taking care at the same time to accommodate the public. Neither is there any authority which says, that having once fixed it, he is compellable ever after to keep it in the same place. In many instances there may be great public convenience in the owner having liberty to remove it, for the buildings in a growing town may take a different direction, away from the old market-place. If the lord, in the exercise of his right, be guilty of any abuse of the franchise, there may be a remedy of another nature. The right of removal, however, is incident to his grant, if he be not tied down to a particular spot, by the terms of it. Till it be removed, the public have a right to go to the place appointed, without being deemed trespassers: but after the lord has removed it, of which public notice was given in this case, the public have no longer a right to go there upon his soil. If a private injury has been sustained by any individual, who has been deceived by the lord having holden out to him a particular site for the market-place, in order to induce him to purchase or build there, for the convenience of it, that may be the subject of an action to recover damages for the particular injury sustained by that individual, but does not preclude the lord's general right to remove the market."

The King *v.* Cotterill, 1 Barn. & Ald. 67.

How franchises may be claimed. 1 Inst. 114 a. 9 Rep. 27 b.

94. The franchises, which have been treated of in this Title, are of two sorts:—First, those which could have no existence till created by an actual grant; such as a hundred, and fairs and markets, &c. As to these, a claim to them must be supported by showing the grant thereof from the Crown, if within time of memory. But if before that period, then they must have the aid of some other matter of record, within time of memory, to make them available; as allowances thereof in eyre, or some judgment of record in the King's Courts, in support and affirm-

ance of them; or some confirmation from the Crown by letters patent; pleadable as a record.

95. The other kind of franchises are those which were originally part of the royal prerogative; and do not owe their existence to a grant from the Crown, which had only the effect of transferring them from the Crown to a subject, such as the free chase, park, warren, &c. To these a title may be claimed by prescription and immemorial usage, without the aid of any record; for such immemorial usage induces a prescription of a royal grant made before time of memory. Idem. Tit. 31. c. 1.

96. Franchises may be destroyed or lost by reunion in the Crown, by the surrender of the person entitled to them, and also by misuser or nonuser of them. But it has been stated that where franchises were annexed to manors, they are not lost by the loss of the manor, but continue to be annexed to the reputed manor. How they may be lost. Soane *v.* Ireland, Dissert. c. 3.

97. It was laid down in the abbot of *Strata Marcella's* case, that when the King grants any franchises which are in his own hands, as parcel of the flowers of the Crown, within certain possessions, there if they come again to the King, they become merged in the Crown, and the King has them again *jure coronæ;* and if they were before appendant, the appendancy is extinct. But when franchises are erected and created by the King *de novo,* there by the accession of them again they are not merged or extinct. As if a fair, market, hundred, or leet, are appendant to manors, or in gross, and come back to the King, they remain as they were before, *in esse,* not merged in the Crown; for they were at first created and newly erected by the King, and were not *in esse* before; and time and usage has made them appendant. Re-union in the Crown, 9 Rep. 24. 17 Vin. Ab. 162. Rex *v.* Capper, 5 Price 217.

98. If A. be seised of a manor, whereunto the franchise of waif, estray, and such like, are appendant, and the King purchases the manor with the appurtenances, now are the royal franchises re-united to the Crown, and not appendant to the manor: but if he grant the manor in as large and ample a manner as A. had it, the franchises shall be appendant, or rather appurtenant, to the manor. 1 Inst. 121 b. 9 Rep. 26 a.

99. Franchises may also be destroyed by a surrender of them to the Crown, of which there are several instances. Surrender.

Misuser or abuser. 12 Mod. 271.

100. Where the object of a franchise is perverted, and there is either a misuser or an abuser of it, the franchise is lost. And it is said by Lord Holt that all franchises are granted on condition that they shall be duly executed, according to the grant. So that if the grantees of such franchises neglect to perform the terms, the patents may be repealed by writs of *scire facias.*

Bro. Ab. Franchise, pl. 14.

101. Where a person has a franchise to hold a market every week, on the Friday, and he holds it on the Friday and the Monday, in this case nothing shall be forfeited but that which he hath purprised. But he who has a fair to hold two days, and holds it three days, forfeits the whole. So where a man has a market to hold on the Saturday, and he holds it on another day, the market shall be forfeited, and he shall be fined for the misusing.

Idem, pl. 22.

102. If the King grants to a person a fair for one day in the year, and the grantee holds a fair two days, and claims this upon process in the Exchequer, he shall forfeit his franchise. But if he claims one day by the patent and another by prescription, which is found false in the prescription, he shall not forfeit his patent.

Idem, pl. 14.

103. If a person has several franchises, and the one does not depend upon the other; there, if he misuses any, he shall not forfeit all, but only those which have been misused. But if one depends upon the other, then if he misuses one, all shall be seised and forfeited.

Non-user. Bro. Ab. Franchise, pl. 10 & 26.

104. Non-user is also a cause of forfeiture of a franchise. Therefore if a vill was incorporated by the King, before time of memory, and the franchise never was used within time of memory, it is lost.

2 Hawk. P. C. c. 11. s. 5.

105. The franchise of holding a court leet will be forfeited, not only by acts of gross injustice, but also by bare omissions and neglects; especially if often repeated, and without excuse.

Tottersall's case, W. Jones 283.

106. George Tottersall claimed, at the justice seat of the forest of Windsor, a court leet within his manor of F. The Attorney-General desired that it might be inquired,—1. If he had used it. 2. If he had an able steward to discharge the office; for the want of that was also a cause of seizure. 3. If he had officers, and those things which are for the execution of justice, as constables, ale-tasters, &c., and pillory, stocks, and

cucking stool, &c. 4. If he punished bakers more than three times, and did not set them in the pillory. All these were causes of seizure, till he paid a fine for the abuse, and replevied his franchise. Mr. Tottersall himself being called and asked concerning his court leet, confessed that he had not used it a great while, nor were there proper officers or other things for the execution of justice: but he said it appeared by ancient rolls that there had been a leet there. Being asked to what leet his tenants went, he said they went to the sheriff's tourn, and paid head silver there. Upon which Mr. Attorney observed, that Mr. Tottersall could have no leet, for all leets were drawn out of the sheriff's tourn, which was the leet in the King's hands, and head silver was *certum lætе*, and no man should be subject to two leets; therefore there could be no allowance of the leet, unless the King should be put out of that which (for aught he knew) he had ever had. So judgment was given against him for the leet.

107. Upon a motion for an information in the nature of a *quo warranto*, against one Bridge, for holding a court leet, it appeared that in 14 Jac. 1. the Crown granted to R. Miller, his heirs and assigns, the privilege of holding courts leet. No mesne conveyance appeared till 1702, when, and in 1708, 19, and 21, there were conveyances of the manor, with all courts thereunto belonging, to those under whom the defendant claimed. In the deed of conveyance to him in 1739 courts leet were expressly conveyed. In 1740 the defendant held a court leet, the first within the memory of any one living, though courts baron had been frequently held. Darell v. Bridge, 1 Black. R. 46.

It was argued that the defendant could not deduce any title under the original grant; or if he could, yet that non-user was a disclaimer, and a forfeiture of such a franchise. On the other side it was contended, that the possession of the grant, together with the land, was an evidence of right; and that it would be of very pernicious consequence to grant these informations, whenever a lord could not deduce a title by mesne conveyances.

The Court said, that as there appeared no exercise of the grant till 1740, there was strong suspicion of some defect in the title: therefore it must go to be tried by a jury. The rule for an information was made absolute.

Rex v. Steward of the manor of Havering, 5 Barn. & Ald. 691.

108. It has been determined by the Court of King's Bench in a late case, that where the King had by charter granted that the steward and suitors of a manor should have power to hold a court, though there had been a non-user for fifty years, yet the right was not lost.

Keilw. 141. b. pl. 13.

109. Free chase and warren may, I presume, like other franchises, be lost by non-user when claimed by prescription, or even by an express grant. As the non-user creates a presumption that the franchise had been surrendered, it is therefore necessary, where a claim of this kind is made, to prove a continued exercise of the right. Though in the case of Leicester forest Lord Coke, as counsel, said it had been adjudged that the non-user of a fair or market, or courts, or such like liberties, wherein the subjects have interest for their common profit, or common justice, is cause of seizure of them: but the non-user of parks, or warrens, or such like, which are to the profit only, or pleasure of the owner, is not any cause of their loss or forfeiture. This does not however appear to be law; for in a case upon the Oxford circuit in 1810, where Lord Uxbridge claimed free warren, Mr. Justice Lawrence stated to the jury, that to establish a right of free warren it was necessary to prove a constant exercise of the right, down to the time when it is claimed.

Cro. Ja. 155. Jenk. 316.

Placita de Quo Warr. p. 139, 141.

TITLE XXVIII.

RENTS.

CHAP. I.

Of the Origin and Nature of Rents.

CHAP. II.

Of the Estate which may be had in a Rent, and its Incidents.

CHAP. III.

Of the Discharge and Apportionment of Rents.

CHAP. I.

Of the Origin and Nature of Rents.

SECT. 1. *Origin of Rents.*
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11. *Rent Sock.*
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13. *Fee Farm Rents.*
15. *What gives Seisin of a Rent.*
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SECTION I.

Origin of rents. Tit. 8. c. 1.

IT has been stated that when the great lords enfranchised their villeins, they still employed them in the cultivation of their estates, which they granted to them, either from year to year, or

for a certain number of years; reserving to themselves an annual return from the tenant, of corn or other provisions. Hence the lands thus granted were called farms, from the Saxon word *feorm*, which signifies provisions.

2. This compensation or return for the use of the land thus let acquired the name of *reddítus*, rent; and is defined by Lord Ch. B. Gilbert to be an annual return made by the tenant, either in labour, money, or provisions, in retribution for the land that passes; from which it follows, that though rent must be a profit, yet there is no occasion that it should consist of money; for capons, spurs, horses, and other things of that nature, may be reserved by way of rent; and it may also consist of services or manual labour, as to plough a certain number of acres of land.

Rents 9.

1 Inst. 142. a.

Idem.

3. The profit reserved as rent must be certain, or that which may be reduced to a certainty, by either party. It must also be payable yearly, though it need not be reserved in every successive year: but will be good if reserved in every second or third year. It must also issue out of the thing granted, and not be a part of the thing itself; for a person cannot reserve a part of the annual profits themselves, as the vesture or herbage of land.

Rent-service, Lit. s. 213.

4. There are three kinds of rent; namely, rent-service, rent-charge, and rent-seck. Where a tenant holds his land by fealty and certain rent, it is a rent service; and this was the only kind of rent originally known to the common law. A right of distress was inseparably incident to it, as long as it was payable to the lord who was entitled to the fealty of the tenant. And it was called a rent service, because it was given as a compensation for the services to which the land was originally liable.

Tit. 2. c. 1.

5. We have seen that in consequence of the statute *Quia Emptores*, if a person makes a feoffment in fee, or gift in tail, with a limitation over in fee, the feoffee or donee will hold of the superior lord, by the same services which the feoffor was bound to perform to him: from which it follows, that upon a conveyance of this kind, no rent-service can be reserved to the feoffor or donor, because he has no reversion left in him; and as the feoffee or donee does not hold of him, he is not bound to do him fealty. But, if upon a conveyance in tail or for life, the donor keeps the reversion, and reserves to himself a rent, it will

be a rent-service, because fealty and a power of distress are incident to such reversion.

6. Where a rent was granted out of lands by deed, the grantee had not power to distrain for it, because there was no fealty annexed to such a grant. To remedy this inconvenience, an express power of distress was inserted in the grant, in consequence of which it was called a rent-charge, because the lands were charged with a distress, for the recovery of the rent. Rent-charge. 1 Inst. 143. b.

7. Rent-charges are of great antiquity, and were probably first granted for the purpose of providing for younger children. They were however considered as contrary to the policy of the common law, for the tenant was thereby less able to perform the military services to which he was bound by his tenure; and the grantee of the rent-service was under no feudal obligations of service; therefore, a rent-charge was said to be against common right.

8. A rent-charge may now be created either by grant, or by means of the statute of Uses. For it is enacted by that statute, ss. 4 & 5., that where divers persons stood and were seised of and in any lands, &c. in fee simple or otherwise, to the use and intent that some other person or persons should have an annual rent out of the same, and in every such case the same persons, their heirs and assigns, that had such use and interest to have any such annual rents, should be adjudged to be in possession and seisin of the same rent, of and in such like estate as they had in the use of the said rent. Tit. 11. c. 3.

9. Lord Bacon, in his reading on this statute, observes that in consequence of the words "were seised" a doubt had arisen whether the statute was not confined to rents in use at the time: but that this was explained in the following clause;—"as if a sufficient grant or other lawful conveyance had been made and executed to them by such as were or should be seised to the use or intent of any such rent, to be had, made or paid according to the very trust and intent thereof." Rivett v. Godson. Tit. 32. c. 10.

10. A rent granted for equality of partition between two coparceners is called a rent-charge, of common right, because the coparcener has given a valuable consideration for it. A rent granted in lieu of lands upon an exchange is of the same nature; as also a rent granted to a widow, out of lands of which she is dowable, in lieu of dower. Lit. s. 252. Gilb. Rent. 19. 1 Inst. 169 a.

Rent-seck.

11. A rent-seck, or barren rent, is nothing more than a rent for the recovery of which no power of distress is given, either by the rules of the common law, or the agreement of the parties.

Other kinds of rents.

2 Inst. 19.

12. Although every species of rent is comprised in the preceding divisions, yet there are some rents which are known by particular names. Thus the certain established rents of the freeholders and ancient copyholders of manors are called rents of assise. Those of the freeholders are also frequently called chief rents, *redditus capitales;* and both sorts are indifferently denominated quit rents, *quieti redditus*, because thereby the tenant goes quit and free of all other services.

Fee farm rents.

1 Inst 143 b. n. 5. 2 Inst. 44. Doug. R. 627. n.

13. A fee farm rent is a perpetual rent reserved on a conveyance of lands in fee simple; and Lord Coke says, if a rent be to the whole value of the land, or to the fourth part of its value, it is called a fee farm. But Mr. Hargrave has observed on this passage that the true meaning of a fee farm is a perpetual farm or rent, the name being founded on the perpetuity of the rent or service, not on the *quantum*: that the sometimes confining the term fee farm to rents of a certain value probably arose, partly from the statute of Gloucester, which gives the *cessavit*, only where the rent amounts to one-fourth of the value of the land; and partly from its being most usual, on grants in fee farm, not to reserve less than a third or fourth of such value.

Bradbury v. Wright, 2 Doug. R. 624.

14. After the statute *Quia Emptores*, granting in fee farm, except by the King, became impracticable; because the grantor parting with the fee, is by the operation of that statute without any reversion; and without a reversion there cannot be a rent service. A perpetual rent may however be reserved on a conveyance of lands in fee simple; and if a power of distress and entry be given to the grantor, his heirs and assigns, the rent will be good as a rent-charge, but not as a fee farm rent.

What gives a seisin of a rent.

Tit. 5. c. 1.

15. With respect to the mode of acquiring seisin of a rent, in the case of a rent service the person entitled cannot acquire a seisin in deed before the rent becomes due; for nothing but the actual receipt of it will have that effect. As to a rent-charge, the only mode of acquiring a seisin in deed of it, when created by grant, is by the actual receipt of the whole, or of some part of it; and formerly it was usual, where a freehold estate in a rent charge was created, to pay the grantee a penny in the name of

seisin of the rent. But where a rent is created by means of a conveyance to uses, the grantee immediately acquires a seisin, by the words of the statute.

16. A rent must in general issue out of lands or tenements of a corporeal nature, whereto the grantee may have recourse to distrain. It could not therefore be formerly reserved out of an advowson in gross, tithes, or other incorporeal hereditaments; because, says Lord Chief Baron Gilbert, every incorporeal right, till by age it was formed into a prescription, did originally rise by grant from the Crown; and such grants seem to have been made for particular purposes; as the grant of a fair, to be under the protection of the lord; the grant of a common for the benefit of the beasts of all the tenants. Therefore, to let such incorporeal inheritances for rent, was esteemed contrary to the design and purposes of such grants.

Out of what a rent may be reserved. 1 Inst. 47 a. 142 a.

Rent, 20, 22.

17. A rent cannot be reserved out of a rent; therefore if a person grants lands in tail, rendering rent, and after grants the rent for life, or in tail, rendering rent, this is a void reservation, because it passes as a rent-seck. And if A. has a rent service or rent charge, and grants it to another for term of life, by deed indented, rendering to A. a certain rent, the reservation is void; because rent cannot be charged with other rent; for it cannot be put in view.

2 Roll. Ab. 446.

Keilw. 161.

18. By the statute 5 Geo. 3. c. 17. it is enacted, that leases made by the ecclesiastical persons therein mentioned, of tithes or other incorporeal hereditaments, shall be good; and that rents reserved in such leases may be recovered by action of debt.

19. Where a lease is made of the vesture or herbage of land, a rent may be reserved; because the lessor may come upon the land to distrain the lessee's beasts feeding thereon.

1 Inst. 47 a.

20. A rent may be reserved upon a grant of an estate in remainder or reversion; for though the grantee cannot distrain during the continuance of the particular estate, yet there will be a remedy by distress, whenever the remainder or reversion comes into possession.

Idem.

21. Where a person grants a future interest in lands, as a lease for years, to commence *in futuro*, he may reserve a rent immediately; for it will be a good contract to oblige the lessee, and to ground an action of debt; and the lessor may have his

2 Roll. Ab. 446.

remedy by distress for the arrears, when the lessee comes into possession.

Windsor *v.* Gover, 2 Saund. 302.

22. It should be observed, that if a lease be made of an incorporeal hereditament, reserving rent, such reservation is good to bind the lessee, by way of contract; for the non-performance of which the lessor shall have an action of debt; because if the lessee undertake to pay an annual sum by his deed, such undertaking gives the lessor a right to it; and the law in all cases gives remedies adequate and correspondent to every man's right.

1 Inst. 47 a. n. 1.

23. A rent may be reserved to the King out of an incorporeal hereditament; because, by his prerogative, he may distrain for

1 P. Wms. 306.

such rent on all the lands of his lessee. And as he has a remedy, there is, therefore, no reason that such a reservation should be void.

Upon what conveyances. 1 Inst. 144. a. Gilb. Rents, 22.

24. With respect to the conveyances upon which a rent can be reserved, it may be laid down as a general rule that a rent may be reserved upon every conveyance which either passes or enlarges an estate; for rent being a return for something given, it follows that whenever an estate passes, there may be a return.

Tit. 32. cc. 9, 10, 11.

25. Rents are most usually reserved on leases: but a rent may also be reserved on a release, a bargain and sale, covenant to stand seised, and lease and release.

Winter's case, 2 Roll. Ab. 448.

26. There may be several reservations of several rents, in the same conveyance. As where a lease was made of three manors, reserving for one a rent of 6*l.*, for another a rent of 5*l.*, and for the third a rent of 10*l.*, with a condition of re-entry into the whole, for non-payment of any part; it was held that these several reservations of rent created several tenures, demises, reversions, and rents.

Tanfield *v.* Rogers, Cro. Eliz. 340.

27. A. tenant in tail of C. leased the site and demesnes of the manor, together with the manor itself, and all lands to the same belonging, for 21 years, rendering for the site therewith letten 6*l.* 6*s.* 8*d.*, and rendering for the said manor and premises therewith letten 9*l.* 10*s.* It was resolved that these were several reservations.

Lee *v.* Arnold, 4 Leon. 27.

28. A lease was made of three manors, viz. D. E. and F., reserving for D. 5*l.*, for E. 10*l.*, and for F. 10*l.*, upon condition that if the said rents, or any of them, or any part thereof, were

behind, the lessor might re-enter into all. The lessor sold the reversion of one of the manors to one W., and afterwards sold him the reversion of the other two manors. The rent being in arrear for one manor, the purchaser entered into all three. Adjudged, that his entry was not lawful; for though the words were joint, yet the reservation and the rents were several.

29. A. seised of Whiteacre, Blackacre, and Greenacre, leased all three to J. S. for 90 years, rendering for Blackacre 3*s.* 4*d.*, for Whiteacre 10*s.*, and for Greenacre 20*s.* quarterly; with a clause of re-entry, if any part or parcel of the said rent should be behind, &c. W. R. purchased the reversion of Blackacre, brought an ejectment for 10*s.* being a quarter's rent, and had judgment; these being several reservations and conditions. A difference was taken between this and Winter's case, the rent in that being originally entire, whereas here it was originally several; and in that case the condition was, that if any part of the rent was behind, the lessor should re-enter into the whole. Hill's case, 4 Leon. 187. Ante, s. 26.

30. But where there is one reservation of rent in gross at first, though it be afterwards divided and severed into different parts, yet it will be one entire rent.

31. The prior of St. John made a lease of divers houses for years, yielding the yearly rent of 5*l.* 10*s.* 11*d.*; viz. for one house 3*l.* 0*s.* 11*d.*, for another 20*s.*, and for the other houses several rents, residue of the said rent; with a condition, that if the said rent of 5*l.* 10*s.* 11*d.* was behind in part, or in all, then the prior and his successors should re-enter. Resolved, that this was one reservation of the rent in gross, at the first; and the viz. afterwards did not make a reservation of it, but was rather a several declaration of the several values of each parcel; by which it appeared how, and at what rates, the whole rent was reserved. Knight's case, 5 Rep. 54.

32. In the above case, Roodes, Justice, said — "If two tenants in common make a lease upon condition, rendering rent; the law will construe the demise, the condition, and the rent, to be several; because the tenants in common have several reversions. Moo. 202.

33. With respect to the persons to whom a rent may be reserved, Littleton lays it down as a certain rule that no rent service can be reserved, upon any feoffment, gift, or lease, to any To what persons. Lit. s. 346.

person but the feoffor, donor, or lessor, or to their heirs; and in no manner to a stranger. The reason of this rule is, because the rent being payable as a return for the possession of the land, can only be reserved to the person from whom the land passes. And as there can be no reservation of rent service to a stranger during the life of the lessor, neither can a rent service be reserved, after the death of the lessor, to any person but the reversioner: for to him the land would belong, if it were not demised.

Gub. Rents. 61.

2 Rail. Ab. 447. 2 Saund. 372.

34. If a person makes a lease, to commence after his death, reserving rent to his heirs; this will be deemed a good rent service, arising to the heir, not by way of purchase, but as incident to the reversion, descending to the heir; and therefore may be released by the ancestor, during his life; which it would not be if it was a new purchase in the heir.

Oates v. Frith, Hob. 274.

35. But where a father and his son and heir apparent demised lands for years, to begin after the death of the father, rendering rent to the son: the father died, the lessee entered, and the rent being behind, the son distrained. Resolved, that this reservation of rent was utterly void; for although the son did prove heir, it bettered not the case by the event: but the reservation should have been to the heir or heirs of the lessor, by that name; for that was the only word of privity in law requisite in the reservation of rents; the heir being *eadem persona cum antecessore*.

1 Inst. 47. a.

36. Where a rent is reserved generally, without specifying to whom it shall be paid, it will go to the lessor; and after his death to the person who would have inherited the land, if no such lease had been made. If the reservation be to the lessor and his heirs, the effect will be the same, provided the lessor was seised in fee.

Cother v. Merrick, Hard. 89.

37. A tenant in special tail leased for years, reserving a rent to himself, his heirs, and assigns;—the question was, to whom it should go, after the death of the lessor; the estate having descended to a person who was not heir at law to the lessor. Lord C. B. Widdrington laid down the following points:—1. Where no person in particular is named to receive the rent, it shall go to the heir, together with the reversion: but where the lessor particularizes the persons, there the law will carry it further, for the agreement of the parties prevents the construc-

ion of law. 2. Where the reservation is special, and to improper persons, there the law follows the words. 3. Where the words are general, they will be expounded according to law. Resolved, that the rent should go with the reversion to the special heir in tail, though it was reserved to the heirs generally; for the word *heir* should be taken in that sense which would best answer the nature of the contract; which was, that those who would have succeeded to the estate, if the lease had not been made, should enjoy the rent.

38. If a rent be reserved to the lessor and his assigns, it will determine at his death; for the reservation is good only during his life. So if a rent is reserved to him and his executors, he having the freehold, it will determine at his death; because the reversion, to which the rent is incident, descends to the heir. But if a lease be made of a term of years, reserving rent to the lessor and his heirs, it will determine by the death of the lessor; for the heir cannot have it, as he cannot succeed to the estate, being only a chattel; and the executor cannot have it, there being no words to carry it to him: [but otherwise, if reserved during the term.]

1 Inst. 47 a. Wooton v. Edwin, 12 Rep. 36.

1 Vent. 161.

Ib. 162.

39. Where a rent was reserved to the lessor, his executors, administrators, and assigns, yearly, *during the term*, it was resolved, that it should go to the heir of the lessor; for although there was no mention of the heirs in the reservation, yet there were words which evidently declared the intention of the lessor, that the payment of the rent should be of equal duration with the lease; the lessor having expressly provided that it should be paid during the term; consequently, the rent must be carried over to the heir, who came into the inheritance after the death of the lessor, and would have succeeded in the possession of the estate, if no lease had been made. And if the lessor had assigned over his reversion, the assignee would have the rent as incident to it; because the rent was to continue during the term, and must therefore follow the reversion, since the lessor made no particular disposition of it, separate from the reversion.

Sacheverell v. Froggatt, 2 Saund. 367.

40. Where no reversion is left in the lessor, and the rent is reserved to his executors, administrators, and assigns, it will go to them, and not to the heir.

41. A tenant for three lives, to him and his heirs, assigned over his whole estate, reserving to himself, his executors, ad-

Jenison v. Lexington, 1 P. Wms. 555.

ministrators, and assigns, a rent of 10*l.*, with a proviso, that upon nonpayment the assignor and his heirs might re-enter; and the assignee covenanted to pay the rent to the assignor, his executors and administrators. The question was, whether this rent should go to the heir or executor of the assignor. It was decreed by Sir J. Jekyll, that the rent should go to the executor, as it was reserved to him; and there was no reversion left in the assignor, to which the rent was incident, so as to carry it to the heir. It was also held, that the covenant to pay the rent to the executors and administrators of the assignor was good and binding, both in law and equity. And though the proviso was, that in case of nonpayment of the rent, the assignor and his heirs might re-enter, yet the Court thought this immaterial; as in equity the heir must, in this case, be looked upon as a trustee for the executor.

This case came on again before Lord King, who was of opinion, that there being no reversion, the rent might be well reserved to the executors, during three lives; and decreed accordingly.

1 Inst. 214 a. n. 1.

42. Lord Coke says, if tenant for life and the person in reversion join in a lease for life, or gift in tail, by deed, reserving a rent, this shall enure to the tenant for life only during his life, and after his death to the person in reversion.

1 Rep. 139 a.

43. It is said, in Chudleigh's case, that if a feoffment in fee be made to the use of one for life, and after to the use of another in tail, with remainder over, with power to the tenant for life to make leases, so that he reserve the best accustomed rent, payable to all those who would have the reversion; if tenant for life makes leases, pursuant to his power, the lessees derive their interest out of the first feoffment. How then can the reservation of the rent be good; and how could his heir, or he in remainder, come at it?

This doubt appears to be removed by the following determination:—

Harcourt *v.* Pole, 1 And. 273.

44. Thomas Lovet levied a fine, to the use of himself for life, after his decease to his executors for twelve years, remainder to his first and other sons in tail, remainder over, with a power to T. Lovet to make leases, not exceeding ninety-nine years. T. Lovet made a lease for sixty years, rendering annually to himself during the term, and after his decease to such person and persons

to whom the reversion or remainder of the premises should, from time to time, belong, by the said limitation of uses, the sum of 3*l.* It was agreed by the Court, that the lease was good enough, and that the rent was distrainable by those in remainder, as they happened to be immediate to the lease.

45. W. Whitlock, being tenant for life, under a declaration of uses of a fine, remainder to his son in tail, remainder over, with a power of leasing, demised the premises, reserving rent to himself his heirs and assigns, and to such other person or persons as should be entitled to the inheritance of the said premises after his decease. It was objected, that this reservation was void; as rent could only be reserved to the lessor, donor, or feoffor, and their heirs, and not to persons only privies in estate, as remaindermen and reversioners. But it was resolved that the reservation was good: that if a reservation had been to the lessor, and to every person to whom the inheritance or reversion of the premises should appertain during the term, it would have been good; for the law would distribute it to every one to whom any limitation of the use should be made. And it was agreed, that the most clear and sure way was to reserve the rent yearly during the term, and leave the law to make the distribution, without an express reservation to any person. Whitlock's case, 8 Rep. 69.

46. With respect to the time when rents are payable, it is either by the particular appointment of the parties in the deed, or else by appointment of law. But the law never controls the express appointment of the parties, where such appointment will answer their intention. At what time payable.

47. Where rent is reserved generally, it is payable at the end of the year: but if it be reserved *annuatim durante termino*, the first payment to begin two years after, this will control the words of reservation. 3 Buls. 329.

48. If a rent be made payable at the two most usual feasts, without specifying them, the law will construe this to mean Michaelmas and Lady-day; because those are the days usually appointed for such payments. And if a lease be made reserving rent at the two usual feasts, without saying by equal portions, the rent shall notwithstanding be paid by equal portions. Harrington *v.* Wise, 2 Roll. Ab. 450.

49. If a lease be made for years, provided the lessee shall pay 10*l.* at Michaelmas and Lady-day, by even portions, during the term, though the word *annually* be omitted, yet the law Id. 449.

will construe it to be so; because it is made payable during the term.

Id. 450.

50. If a lease be made on the first of May, or at any other time, reserving rent, payable quarterly; this shall be intended quarterly from the date of the lease, and not at the usual feasts.

Clun's case, 10 Rep. 127.

51. A lease was made for twenty years, reserving rent during the term, payable at Michaelmas and Lady-day, or within thirteen weeks after every of the said feasts. Resolved, that the rent was not payable till the end of the thirteen weeks; the disjunctive being evidently added for the benefit of the lessee.

Glover v. Archer, 4 Leon. 247.

52. In a subsequent case, a tenant for life made a lease for twenty-one years, rendering rent at Michaelmas and Lady-day, or within thirteen weeks of any of the said feasts. After Michaelmas, before the thirteen weeks past, the tenant for life died, and his executors brought an action of debt for the rent. It was adjudged that the action did not lie; for the rent being to be paid at Michaelmas or thirteen weeks after, the lessee had his election to pay it at any of the days; and before the last day it was not due. If the rent had been reserved at Michaelmas, and if it was behind for thirteen weeks, then that it should be lawful for the lessor to re-enter; the rent would have been due at Michaelmas, the thirteen weeks being but a dispensation of the entry.

Barwick v. Foster, Cro. Jac. 233. 310.

53. Where a lease ends at Michaelmas, and the rent is payable on that day, or within ten days after, the last payment is due at Michaelmas, without any regard to the ten days; the rent being due for the last year, though the year expired before the ten days. For the reservation being annually during the term, at the said feasts, or within ten days, it should be expounded, according to the contract, at the end of every ten days during the contract; but the term ending at Michaelmas, so as there could not be ten days after, the law will reject the ten days after the last feast, for that cannot be; and then it was due at the feast, according to the contract of the parties.

Biggin v. Bridge, 3 Leon. 211. 3 Keb. 534.

54. A lease was made of tithes, from February 1661 to Michaelmas 1668, reserving rent at Lady-day and Michaelmas. or within twenty days after each feast, during the term. An action was brought for the rent which became due at Michaelmas

1668; to which the defendant demurred, because the last Michaelmas day was not within the term. Held by Twisden, that in contracts the intent is sufficient, and that Michaelmas-day must here be taken to be inclusive.

When it goes to the executor, and when to the heir.

55. The right to a rent service is real property, and descendible to the person entitled to the reversion of the lands out of which it issues. But from the moment that a payment of rent becomes due, it is then personal property: therefore where the person entitled to a rent service outlives the day on which it becomes due, it will go to his executor or administrator; but if the lessor dies on the day preceding the day of payment, the rent will go to the heir, as incident to the reversion.

1 Saun. 287. n. 11.

56. Although rent must be demanded at sunset of the day on which it is payable, if the lessor intends to take advantage of a condition; yet rent is not due till the last minute of the natural day. In the case of leases made by tenants in fee, or under a power, if the lessor dies on the day of payment, but before midnight, the rent will go along with the land to the heir, or the person in remainder or reversion; because the lessee has till the last instant to pay his rent: consequently, the lessor dying before it was completely due, his personal representatives can make no title to it.

57. But where a lease is made by a bare tenant for life, which determines at his death, there, if the person entitled to the rent lives to the beginning of the day on which it is payable, it will vest in his personal representative.

Southern *v.* Bellasis, 1 P Wms. 179.

58. A term of five hundred years was created for securing a rent-charge of 200*l.* a year to Lady Cole for her life. Lady Cole died at nine o'clock of the night of Michaelmas-day, on which day the rent was payable. The question was, whether the term was void without payment of this quarter's rent; or whether this quarter's rent remained due to Lady Cole, so as to entitle her administrator thereto.

Mr. Justice Tracy was of opinion that the rent was due, when by law it ought to be paid; therefore since Lady Cole lived beyond sunset, which was the time when the money was demandable, and to be paid by the tenant upon pain of forfeiting his lease, he thought the money was due to her, and ought to be paid to her administrator.

Strafford v. Wentworth, 1 P. Wms. 180. Prec. in Cha. 555. 10 Mod. 21.

59. Sir Henry Johnson was tenant for life, with remainder to Lady Wentworth. Sir H. Johnson made leases for years, reserving the rent at Lady-day and Michaelmas, and died on Michaelmas-day about twelve o'clock at noon. The question was, whether these rents belonged to the executor of Sir Henry Johnson, or to Lady Wentworth; or whether the tenants should retain them.

Lord Macclesfield decreed, that as to those leases which determined on the death of Sir H. Johnson, the rents belonged to his executors; because, though for the benefit of the tenants, they had till the last instant of Michaelmas-day to pay the rents, yet the reservation being on Michaelmas-day, as soon as that day began, they were at their peril to take care that they were paid accordingly. But as to the leases made by virtue of a power, they still had existence; therefore the tenants had till the last instant of the day to pay the rent: then, when the lessor died before, the rent went along with the reversion, to the person who was entitled to it.

Rockingham v. Penrice, 1 P. Wms. 178.

60. Sir James Oxenden, before marriage, settled an estate on his lady, the plaintiff, for her life, with a power to himself to make leases. Sir J. O. made leases pursuant to his power, reserving the rent at Lady-day and Michaelmas; and died upon Michaelmas-day, between three and four o'clock in the afternoon, before sunset. One of the lessees paid his rent to Sir James Oxenden in the morning of the said Michaelmas-day: but the other tenants had not paid their rents. The question was, whether the rents which were not paid belonged to the executors of Sir J. Oxenden, or to the jointress.

It was decreed by Sir John Trevor, M. R., that the lessor dying before sunset, and there being no remedy for the lessor to recover these rents during his life, they should go to the jointress; and that the executors of Sir J. O. should also pay the rent which he received on the day of his death, to the jointress. But as to this last point there is a *query* by the reporter.

See 1 Swans. 345. note ib. 338, &c.

2 Mad. 268.

61. [In the recent case of Norris *v.* Harrison, a tenant for life having granted leases in conformity with his power, died before midnight, though after sunset, on the rent day, and the remainder-man was declared entitled to the rent.]

62. Rent service is now sometimes apportioned between the executor of a tenant for life, and the remainder-man; of which an account will be given in the third Chapter of this Title.

63. A rent-charge of inheritance is also a real property, descendible to the heir. But from the moment that a payment of it becomes due, that payment is personal property, and will go to the executor or administrator.

Remedies for recovery of rents.

64. With respect to the remedies for the recovery of rents, there are several sorts, of which some are provided by the common law, some by particular statutes, and some by the express agreement of the parties.

Distress.

65. Where a rent-service is in arrear, the common law gives to the person in reversion a right to enter on the lands, to seize the cattle, and other personal chattels found there, and to sell them for the payment of the rent; which is called a distress.

2 Inst. 122. Att.-General *v.* Coventry, 1 P. Wms. 306.

66. If a person holds lands of the King, by the payment of rent, and the rent is in arrear, the King may distrain in any other lands or tenements of the tenant. This must, however, be understood of such other lands as his tenant has in his own actual possession, and are manured with his own beasts; but not in the possession of his lessee for life, years, or at will; for their beasts are not subject to such distresses. The grantee of a fee farm rent from the Crown has the same privilege.

67. The remedy by distress has been extended, by several statutes,(*a*) to the proprietors of what were formerly called rents seck, and also to rent-charges; and also to the executors and administrators(*b*) of the proprietors of such rents, [and

(*a*) [32 Hen. 8. c. 37. 8 Ann. c. 14. 4 Geo. 2. c. 28. 11 Geo. 2. c. 19. 57 Geo. 3. c. 52.]

(*b*) [Where the owner of the inheritance granted a lease for years reserving rent, and died, his executor could not at common law, nor by the statute 32 Hen. 8. c. 37. distrain for the arrears of rent accrued in the lessor's lifetime; for the latter statute was confined to the representatives of persons dying seised of rents in fee, in tail or for life. Prescott *v.* Boucher, 3 B. & Adol. 849. Jones *v.* Jones, ib. 867. But now by stat. 3 & 4 Will. 4. c. 42. ss. 37, 38. the law is amended in the above respect. By the latter statute it is enacted that the executors or administrators of *any* lessor or landlord, may distrain upon the lands demised for any term or at will, for the arrearages due to such lessor or landlord in his lifetime, in like manner as such lessor or landlord might have done in his lifetime. And such arrearages may be distrained for after the determination of such term or lease at will, in the same manner as if such term or lease had not been ended or determined, provided such distress be made within the space of six calendar months after the determination of such term or lease, and during the continuance of the possession of the tenant from whom such arrears became due; and all powers and provisions in the several statutes made relating to distresses for rent are made applicable to the distresses so made as aforesaid.]

[illegible] reserved in leases for years, even after the determination of the leases upon which such rents are reserved.

[illegible]

[illegible] It was formerly usual, where a feoffment was made, reserving rent, to insert a condition in the deed that if the rent was behind, it should be lawful for the feoffor and his heirs to re-enter and hold the lands till he was satisfied for what was in arrear. This was held not to be a condition absolutely to defeat the estate: but that the feoffor on his entry should hold the land as a pledge, till he was paid his rent. And that the profits should not go in discharge of the rent, but should be applied to his own use. Lord Coke, however, observes that if the words of the condition were, that the feoffor should re-enter and take the profits, till thereof he was satisfied: there the profits should be accounted as part of the satisfaction.

[illegible]

Idem, s. 2.

69. The distinction when the profits taken by the lessor after entry are, and when they are not to be, in satisfaction of the rent, is not admitted in equity. For the Court of Chancery will always make the lessor account to the lessee for the profits of the estate, during the time of his being in possession; and will compel him, after he has satisfied the rent in arrear, and the costs attending his entry, and detention of the lands, to give up the possession to the lessee, and to pay him the surplus profits of the estate.

Jemmott v. Cooly, 1 Lev. 170. T. Raym. 136. 158. 1 Sound. 114.

70. In grants of rent-charges, a clause of entry on the lands out of which the rent-charge is granted is usually inserted; in consequence of which an interest vests in the grantee, whenever the rent-charge is in arrear; which he or his assigns may reduce into possession by an ejectment. But the possession thus acquired is only till the grantee of the rent-charge is satisfied his arrears out of the rents and profits of the land.

Gilb. 73.

71. In case of a distress, no demand of the rent is necessary: but where the remedy for the recovery of rent is by way of entry, there must be an actual demand made, previous to the entry, otherwise it is tortious; because a condition or power of entry is in derogation of the grant; and the estate at law being once defeated, it is not to be restored by any subsequent payment. It is therefore presumed that the tenant is residing on the premises, in order to pay the rent, for the preservation of the estate, unless the contrary appears, by the feoffor's being there to demand it. So that unless there be a demand made, and the tenant thereby,

contrary to the presumption, appears not to be on the land, ready to pay the rent; the law will not give the lessor the benefit of re-entry, to defeat the tenant's estate, without a wilful default in him; which cannot appear, unless a demand is actually made on the land.

Right of entry by way of use. Gilb. 137. Havergill *v.* Hare, Cro. Ja. 510.

72. In the creation of rent-charges, a right of entry is now usually given by the operation of the Statute of Uses. As if lands are conveyed to A., to the use, intent, and purpose that B. may receive out of the lands so conveyed a certain annual sum or yearly rent-charge; and to this further use, intent, and purpose, that if such rent-charge be in arrear for a certain time, it shall be lawful for B. and his assigns to enter upon and hold the land, and receive the profits thereof, till the arrears of the rent-charge are satisfied. Here, as soon as the rent is in arrear, a use, derived out of the seisin of the trustee or releasee to uses springs up, and vests in the person to whom the power of entry is given, which is immediately transferred into possession, by the operation of the statute 27 Hen. 8.: he has consequently a right to take and keep that possession, till the purpose for which it is executed is satisfied; when the use determines. By virtue of this estate he may make a lease for years to try his title in ejectment, either to obtain possession of the land, if it be withheld from him, or to restore it, if it be disturbed or devested; and if he assigns over the rent-charge, this right of entry and perception of the rents and profits of the lands, charged with the payment of it, will pass to the assignee.

Tit. 11. c. 3.

Ejectment. 1 Saund. R. 287. n.

73. By the statute 4 Geo. 2. c. 28. s. 2. it is enacted, that every landlord, who by his lease has a right of re-entry in case of non-payment, when half a year's rent is due, and no sufficient distress is to be found, may serve a declaration in ejectment on his tenant, and affix the same on some notorious part of the premises; which shall be valid without any formal re-entry, or previous demand of rent: and that a recovery in such ejectment shall be final and conclusive, both in law and equity; unless the rent and all costs be paid within six calendar months after. (*a*)

See 7 East. 363.

1 Burr. 620. 7 Term R. 117.

74. [The statute 1 Geo. 4. c. 87. provides landlords with more expeditious modes of recovering the possession of lands and tene-

(*a*) [A mortgagee of a lease has the same title to relief against an ejectment for non-payment of rent, and upon the same terms as the lessee, against whom the recovery is had. Doe d. Whitfield *v.* Roe, 3 Taunt. 401.]

1 Dow. & Ry. 433. 435. 2 lb. 565.

ments unlawfully held over by tenants. The recent case of Doe v. Roe, 5 Bar. and Ald. 766—770, has decided that tenants from year to year are not within the provisions of the above act.]

1 Inst. 202 a. n. 3.

75. By the fourth section of this statute it is provided, that if the tenant, at any time before the trial in ejectment, pays or tenders to the lessor or landlord the whole rent in arrear, with the costs; or pays such arrears and costs into Court; the proceedings in ejectment shall cease and be discontinued.

Actions of debt and covenant.

76. In most cases an action of debt may now be brought for rent. And in all modern leases wherein rent is reserved, a covenant is inserted, on the part of the lessee, to pay the rent; on which an action of covenant may be brought.

Ante, s. 20.

Courts of equity. Treat. of Eq. B. 1. c. 3. s. 3.

77. As it is a maxim of equity that a right shall not be without a remedy, the Court of Chancery will, in some cases, give its assistance to persons entitled to rent: but equity will not afford a remedy for rent, when there is one at law; nor change the nature of the rent, so as to make the person liable, unless there is fraud in preventing a distress.

Bridgewater v. Edwards, 6 Bro. Parl. Ca. 368.

78. Where by great length of time it is become impossible to know out of what particular lands ancient quit rents are issuable, the Court of Chancery has exercised a jurisdiction; and has constantly, on proof of payment within a reasonable time, decreed a satisfaction for all arrears of such rents; and payment thereof for the future.

CHAP. II.

Of the Estate which may be had in a Rent, and its Incidents.

SECT. 1. *An Estate in Fee.*
2. *An Estate Tail.*
3. *An Estate for Life or Years.*
4. *Occupancy of a Rent.*
10. *Subject to Curtesy.*
13. *And to Dower.*
21. *Rents may be granted in Remainder.*
SECT. 24. *And to commence* in futuro.
26. *And to cease for a Time.*
27. *Are within the Statute of Uses.*
31. *Cannot be Devested.*
34. *How Forfeited or Lost.*

SECTION I.

WITH respect to the estate which may be had in a rent, a person may be tenant in fee simple of a rent-service created prior to the statute *Quia Emptores*. And a rent-charge may be limited to a person and his heirs, which will give him an estate in fee simple in it. An estate in fee.

2. A rent-charge being an incorporeal hereditament, issuing out of lands, is comprehended within the statute *De Donis Conditionalibus*, and may therefore be entailed. There is, however, a very material distinction between a rent limited to a person and the heirs of his body, and an estate in land limited in the same manner; of which an account will be given hereafter. An estate tail. Tit. 2. c. 1. Tit. 36. c. 7.

3. A rent-charge may be limited to a person for his own life, or for that of any other, or for any number of lives; in which case the grantee will be tenant for life, or *pour auter vie*, of such rent. A rent-charge may also be limited to a person for any number of years. An estate for life or years.

4. By the common law there could be no general occupant of a rent; thus where a rent was granted to A. during the life of B., and A. died, living B., it was resolved, that the rent was determined. For the grant being originally made to A. only; when he died, no one could claim it as occupant, because there could be no entry upon it; nor could any one claim it under the deed, Occupancy of a rent, Salter *v.* Boteler, Vaugh. 199. 1 Salk. 189.

because no one was party to it, but the grantee. It followed, therefore, that as no one could take it under the grant, it ceased.

1 Inst. 388. a. Vaugh. 201.

5. There might, however, be a special occupant of a rent; as if a rent was granted to A. and his *heirs*, during the life of B., and A. died, living B., the *heir* of A. would take the rent as special occupant.

Bowles *v.* Poore, Cro. Jac. 282.

6. A person granted a rent-charge to W. R. to him and his heirs, during his life, and the lives of M. his wife, and D. and M. his daughters. It was contended that this rent, being granted to one and his heirs, during his life and that of three other persons, was not descendible to the heir, nor should the heir be occupant thereof. But all the Court held these limitations to be good enough; and that the heir should have this rent, as a party specially nominated, and as heir by descent; though it was not properly an estate descendible.

Buller *v.* Cheverton, 2 Roll. Ab. 152.

7. It is said to have been formerly held, that if a man granted a rent to A., his *executors, administrators*, and assigns, during the life of B., the *executor* of the grantee should not be a special occupant, because it was a freehold, which could not descend to an executor.

3 P. Wms. 264. Tit. 3. c. 1. ss. 52, 53.

Mr. Cox, in his valuable notes on Peere Williams, has observed, that there seems to have been no sound reason for this distinction; and it appears to be now settled, that a freehold estate may become vested in *executors*, as special occupants.

Idem.

8. In consequence of the statute of Frauds, 29 Ch. 2. c. 3. s. 12. an estate *pour auter vie* in a rent is now devisable: if not devised, it is assets by the statute 14 Geo. 2. c. 20. in the hands of the heir, if he takes it as special occupant. Where there is no special occupant, it will vest in the executors or administrators of those who died possessed of it, and shall be assets in their hands.

3 P. Wms. 264. n. D.

9. It is also said by Mr. Cox to have been laid down by Lord Harcourt, that if, since the statute of Frauds, a rent be granted to A. for the life of B., and A. die, living B., A.'s executors or administrators shall have it during the life of B. For the statute was not only made to prevent the inconvenience of scrambling for estates, and getting the first possession, after the death of the grantee; but likewise for preserving and continuing the estate during the life of the *cestui que vie*. That though by his

dying without having made any such disposition, in nicety of law, the estate would have determined, yet by the statute, that interest which passed from the grantor ought to be preserved, and should go to the executors or administrators of the grantee, during the life of the *cestui que vie;* and the statute in this case did not enlarge, but only preserve, the estate of the grantee. 7 Ves. 448.

10. A person may be tenant by the curtesy of a rent-service, where he is entitled to the reversion; as also of a rent-charge; and a seisin in law will be sufficient for that purpose, because in many cases it may be impossible to acquire any other seisin. Subject to curtesy. Tit. 5. c. 1. 1 Inst. 29 a.

11. A rent-charge was granted to a woman and her heirs, payable at two feasts in the year, the first payment to be made at such of the said feasts as should happen after the death of J. S. The woman married, had issue, and died. The question was, whether the husband should be tenant by the curtesy of this rent. No judgment appears to have been given; but Glynn, Chief Justice, thought the husband was entitled to curtesy; for though the rent was to commence *in futuro*, yet it was granted over presently, which proved it to be *in esse;* so that the wife might be said *habere hæreditatem;* and the seisin was not material, it being the case of a rent. Dethick *v.* Bradburne, 2 Sid. 110. 117.

12. It is said by Lord Coke, that if a woman make a gift in tail, reserving a rent to her and her heirs, and the donor taketh husband, and hath issue, and the donee dieth without issue; the wife dieth; the husband shall not be tenant by the curtesy of the rent; for that the rent newly reserved was determined by the act of God, and no estate thereof remained. But if a man be seised in fee of a rent, and maketh a gift in tail general to a woman; she taketh husband, and hath issue; the issue dieth; the wife dieth without issue; he shall be tenant by the curtesy of the rent, because it remaineth. 1 Inst. 30 a. Vide Tit. 5. c. 2.

13. A rent-service is subject to dower; so that if a man makes a lease for years, reserving rent, and afterwards marries, and dies, his wife will be dowable of a third part of the reversion, together with a third part of the rent. So if a man makes a gift in tail, reserving rent to him and his heirs, and after marries and dies, his wife will be dowable of this rent, because it is a rent in fee, and may by possibility continue for ever. And to dower. 1 Inst. 32. a.

14. A rent-charge in fee or in tail is also subject to dower. If a rent-charge be granted to a man and his heirs, who dies, and 1 Inst. 32 a. Id. 144 b.

his widow brings a writ of dower against the heir, and he answers that he claims the same as an annuity, and not as a rent-charge, yet the widow shall recover dower out of it; for the heir cannot determine his election by claim, but by suing a writ of annuity.

Chaplin *v.* Chaplin, 3 P. Wms. 229.

15. Where a rent *de novo* is granted to a man and the heirs of his body, and the grantee dies without issue, his widow shall not be endowed of it; for the rent being determined by the death of the husband without issue, the widow cannot be endowed of that which is not in being. Though it is otherwise where a tenant in tail of lands marries, and dies without issue, whereby the estate tail is determined, for in that case it has been shewn that the wife shall be endowed.

Tit. 6. c. 3.

16. It is however said by Lord Talbot, in the above case, that if a rent *in esse* be granted to A. in tail, remainder to B. in fee, and A. marries and dies without issue, his wife shall be endowed: or if a rent *de novo* be granted to A. in tail, remainder to B. in fee, and A. marries and dies without issue, his wife shall be endowed. For the estate tail in the rent shall be allowed to continue, as against the remainder-man.

17. [But the widow is not entitled to dower out of a personal annuity granted to the husband and his heirs, because it is only a charge upon the person of the grantor, and does not issue out of lands and tenements.

Co. Lit. 32. 144 b.

18. In the case of Holdernesse *v.* the Marquis of Carmarthen, a yearly sum of 2000*l.* payable out of the Post Office revenues until 100,000*l.* should be paid, in order to be laid out in land, was held to be an annuity perpetual in its nature.

1 Bro. C.C. 377.

19. In the Earl of Stafford *v.* Buckley, an annuity granted by King Charles II. out of Barbadoes dues, was held not to be a rent nor realty.

2 Ves. Sen. 170. Aubin *v.* Daly, 4 Bar. & Ald. 59.

20. A widow however, previously to the recent statute 3 & 4 Will. 4. c. 105. would not be entitled to dower out of a rent-charge, unless the husband had the legal estate in it; but now, by the second section of that act, widows, married since the 1st of January, 1834, are dowable out of equitable estates.]

Chaplin *v.* Chaplin, *infra.* *s.* 30.

Rents may be granted in remainder.

21. A rent-charge may be granted in remainder after a limitation of it to a person for life: and if a rent-charge were granted to A. for the life of B., remainder over; though A. should die in the lifetime of B., so that the particular estate determined

in interest, as to the perception of the profits; yet, inasmuch as the terre-tenant during the time held the land discharged, it was sufficient to support the remainder. Sellers v. Butler, Yelv. 9.

22. Mr. Fearne doubted whether this holding of the land discharged would have supported a contingent remainder: but has said, that at this day there could be no room for a question of this nature; for since the statute 29 Cha. 2. and 14 Geo. 2. c. 20. the rent-charge is holden to continue in the personal representatives of the grantee, dying in the lifetime of the *cestui que vie*. Cont. Rem. 452. Ante, s. 8.

23. A grant of a rent-charge to A. and the heirs of his body, remainder to B. and his heirs, has been held to be good. For though it was objected that there could be no remainder of that whereof there was no reversion; yet it was held by Lord Holt that there may be a remainder of a rent *de novo*; for the intent of the party gives it, first a being for the whole, and then the lesser estates are carved out of it. Weeks v. Peach, 2 Salk. 577.

24. A rent-charge *de novo* may be granted so as to commence *in futuro*; for this is not like the case of lands, where the livery must carry the freehold immediately; and where the abeyance, for want of distinguishing in whom the freehold is, may be of prejudice to the rights of others. But the grant of a rent *de novo* is not attended with the like inconvenience; for no man can have a precedent right to a thing which is created by the grant itself. And to commence *in futuro*.

25. A rent *in esse*, or already created, cannot however [at common law] be granted, to commence *in futuro*; because to such a rent there may be a precedent title; therefore, the grant is not good. For such freeholds being thus split and severed, do hide the person in whom the right is; by which the party that has right will not be able to discern against whom to bring his *præcipe* for recovering it. Gilb. 60.

26. A rent *de novo* may be limited so as to cease for a time only, and afterwards to revive. Thus where a rent *de novo* was granted to a man and his heirs, with a proviso that if the grantee died, his heir within age, then the rent should cease during the minority of the heir. The grantee died leaving his heir within age. The widow of the grantee brought a writ of dower against the terre-tenant; and it was held in parliament that she should have execution against the heir, when he came of age. And to cease for a time. Fitz. Ab. Dower, 143. Jenk. Cent. 1 Ca. 6.

Are within the statute of Uses. Tit. 11. c. 3.

27. Rents (*a*) are expressly mentioned in the statute 27 Hen. 8. c. 10.: they may therefore be conveyed to uses, and will be executed by the statute; which not only transfers the rent, but also all remedies and rights given for the recovery thereof. But that statute does not transfer collateral rights.

Cook *v.* Herle, 2 Mod. 138.

28. T. C. granted a rent-charge of 200*l.* a-year to trustees, in trust for Mary Cook, to hold to them, their heirs, executors, administrators, and assigns, in trust for the said Mary for life; with a clause of distress, and a covenant to pay the rent-charge to the trustees for the use of the wife. The Court was of opinion that this rent-charge was executed by the statute of Uses, by the express words thereof, which executes such rents granted for life, upon trust, and transfers all rights and remedies incident thereto, together with the possession, to the *cestui que use;* so that though the power of distraining was limited to the trustees by the deed, yet by the statute which transferred that power to Mary Cook, she might distrain also. But the covenant, being collateral, could not be transferred.

Tit. 12. c. 1.

29. The operation of the statute of Uses is the same in the case of rents as in that of lands: for it only transfers the legal estate in the rent to the first *cestui que use;* therefore a conveyance to A. and his heirs, to the use and intent that B. and his heirs may receive a rent out of the estate, gives B. the legal estate in the rent; and if it is afterwards declared that B. and his heirs are to stand seised of that rent to uses, the intended *cestuis que use* take only trust or equitable estates.

Chaplin *v.* Chaplin, 3 P. Wms. 229.

30. Lady Hanby conveyed divers lands, to the use and intent that certain trustees, in the deed named, should receive and enjoy a rent-charge of 30*l.* a-year to them and their heirs; and then the said rent was to be to the use of Porter Chaplin in tail male, remainder over. Porter Chaplin died, leaving issue Sir John Chaplin, who married the plaintiff, and died without issue. One of the questions was, whether Lady Chaplin was dowable of this rent.

Lord Talbot was of opinion, that Sir John Chaplin having only a trust estate in this rent, his widow was not dowable of it.

Cannot be devested. C. 1. 5 Rep. 124. a.

31. The mode in which seisin of a rent may be acquired has been already stated. Where a person has been once seised or

(*a*) [Such only of which the owner is seised, that is, rents in fee, in tail or for life.]

possessed of a rent, he cannot afterwards be disseised or dispossessed of it; for a rent being merely a contingent right, collateral to, though issuing out of lands, it cannot be devested. And although a person entitled to a rent be not in the actual receipt and enjoyment of it, yet by *nonuser* only, he does not cease to have a vested estate or interest therein, so that he still continues to be in possession; therefore a rent, being a mere creature of the law, is always considered to be in the possession of him whom the law adjudges to have a right to such possession. Hawk. P. C. c. 64. s. 45.

32. Thus Lord Coke says, a man cannot be disseised of a rent service in gross, rent-charge, or rent-seck, by attornment or payment of the rent to a stranger, but at his election; the rule of law being, *nemo redditum alterius, invito domino, percipere aut possidere potest.* And Lord Ch. B. Gilbert observes, that if A. is seised of a rent charge, and the tenant of the land pays it to another, this does not devest A. of his right; because the wrongful payment of A.'s tenant cannot alter his right. It is therefore a payment in his own wrong, and the rent still remains in arrear to A. 1 Inst. 323 b. Ten. 104. Lit. s. 558, 9.

33. It should however be observed, that Littleton states several cases of disseisin of rent: but these are only disseisins at the election of the party; for when he wrote, an assise was, in most cases, the only remedy for the recovery of a rent, which only lay where the party was disseised. But disseisins of incorporeal hereditaments are only at the election and choice of the party injured, who, for the sake of more easily trying the right, is pleased to suppose himself disseised; for as there can be no actual dispossession, he cannot be compulsively disseised of any incorporeal hereditament. s. 237. 240. 10 Rep. 97 a.

34. A particular estate in a rent, or in any other incorporeal hereditament, is not forfeited by a grant of it in fee simple, by deed. As if tenant for life or years of a rent, grants the same by deed to another in fee, this is no forfeiture of his estate; for nothing passes thereby but that which lawfully may pass. How forfeited, or lost. 1 Inst. 251.

35. A particular estate in a rent, or in any other incorporeal hereditament, may however be forfeited by matter of record, of which an account will be given in a subsequent title. Tit. 35. c. 12.

36. Although it is said that rents cannot be devested, yet Ante, s. 31.

22 Hen. 8. arrearies for rent are limited to fifty years, so that a quit rent or rent of assize may be lost by non-claim. But it was held in a modern case that mere length of time, short of the period fixed by the statute of Limitations, and unaccompanied with any circumstances, was not of itself a sufficient ground to presume a release or extinguishment of a quit rent.

Eldridge v. Knott, Comp. R. 214.

CHAP. III.

Of the Discharge and Apportionment of Rents.

SECT. 1. *Discharge of Rent-service.*
16. *Discharge of Rent-charge.*
22. *Apportionment of Rent-charge.*
27. *Apportionment of Rent-service at law.*
44. *Apportionment by Statute* 11 *Geo.* 2.

SECTION I.

A RENT-SERVICE being something given by way of retribution to the lessor, for the use and occupation of the land demised, the lessor's title to the rent is founded on the principle that the land demised is enjoyed by the tenant: but if the tenant be by any means deprived of the land demised, his obligation to pay the rent ceases; as it would be unjust that he should be obliged to make a return for that which he does not enjoy. It follows that if the tenant be evicted from the lands demised to him, he will thereby be discharged from payment of the rent.

Discharge of rent-service. Gilb. Rents 145.

2 Roll. Ab. 429.

2. In cases of this kind the tenant is, however, liable to the payment of the rent which became due before the eviction, because the obligation continues as long as the consideration. But if the tenant be evicted, by a title paramount before the day appointed for the payment of the rent, such eviction will discharge the tenant from the payment of any part of it.

Idem.

Gilb. 145.

3. Where the lord purchases the tenancy, the rent will be discharged; for in such case the lord cannot have both the land and the rent. Nor shall the tenant be under any obligation to pay rent, when the land which was the consideration, is resumed by the lord. This resumption or purchase of the tenancy by the lord, makes what is called an extinguishment of the rent.

Idem. Smith v. Malings, Cro. Jac. 160. Fishe v. Campion, 1 Rol. Abr. 234 (B). 5. Ibid 235 (B). 12. Hodgkins v. Robson, 1 Vent. 277. S.C. 2 Lev. 143.

4. If the conveyance of the land to the lord be not absolute, but upon condition; or if it be only of a particular estate, of shorter duration than the estate which the lord has in the rent

Gilbert, 150.

service; in these cases, though there be an union of the tenancy and the rent in the same hand, yet as that union is only temporary (for upon the performance of the condition, or determination of the particular estate, the tenant will be restored to the enjoyment of the land), the obligation of the tenant to pay the rent will revive; therefore, the rent, in such case, is only suspended, not extinguished.

Idem, 152.

5. Where a person, who has a rent service, purchases part of the land out of which the rent issues, the whole of the rent service is not thereby discharged, but only a part proportioned to the quantity of land purchased; because in the case of a rent service, the tenant, being under the obligation of fealty to perform to his lord the services due for the land which he holds of him, this obligation continues while any part of the land is held by the tenant; otherwise the remaining part of the lands would be held of nobody, and freed from all feudal services, which would formerly have been a detriment to the public. And as the tenure between the lord and tenant continued, for so much of the land as remained unpurchased the tenant was, by his oath of fealty, obliged to perform the services: but as the lord had resumed part of the land, the services were diminished in proportion to the quantity of land resumed.

Lit. 222.

18 Vin. Ab. 504.

6. A person who has a rent service may release a part of it; which will not determine the whole rent, but only the part released.

7. Where the law creates a duty or a charge, which the party is disabled to perform, without any default in him, and he has no remedy over, there the law will excuse. This is the principle upon which the tenant has been held, in the preceding cases, to be discharged from the payment of rent. But when the party by his own contract, creates a charge or duty on himself, he is bound to make it good, notwithstanding any accident by inevitable necessity; because he might have provided against it by his contract.

Paline *v.* Jane, 1 Roll. Ab. 939. Allen 26. Sty. 47.

8. In consequence of this principle, it was resolved, that a lessee for years was bound to pay his rent, though an army had entered on the lands, and kept him out; because the rent became due by an express agreement between the lessor and lessee, not by act in law. For an action of covenant lay against the lessee for non-payment of the rent upon the reservation,

which was an agreement between them; and there was no more reason that the lessor should sustain the damage by the enemies than the lessee; inasmuch as the lessee had full power of the land during the term, and, by his own contract, was to pay the rent upon all perils.

9. It has been resolved, that if the lessee of a house covenant to pay rent during the term, he is compellable to pay it, though the house is burnt down, and the landlord is bound to rebuild it. And this doctrine has been fully confirmed in the following modern case. Monk *v.* Cooper 2 Ld. Raym. 1477.

10. In a lease of a house and warehouse at Wapping, the lessee covenanted to pay the rent, and keep the premises in repair, casualties by fire only excepted. The house was burnt down by accident, and the lessor brought an action of covenant for the rent. The lessee pleaded that the house was burnt down by accident. Upon demurrer, the Court was of opinion that the point had been determined in the cases of Padine *v.* Jane, and Monk *v.* Cooper: and judgment was given for the plaintiff. Belfour *v.* Weston, 1 Term R. 310. 710.

Loffs v Denis 2 B. 28 L J 169 L J 32 - P 273

Mr. Justice Buller read a note of the case of Pindar *v.* Rutter at the sittings at Westminster after Mich. 1767, which was an ejectment by the tenant against his landlord, to recover the possession of some houses that had been burnt down during the term, and had been rebuilt by the landlord. In the lease there was an express covenant on the part of the tenant to pay rent; but he had paid none subsequent to the fire. Lord Mansfield said, the consequence of the house being burnt down was, that the landlord was not obliged to rebuild; but the tenant was obliged to pay the rent during the whole term. The premises consisted of houses only, and the fire had made them quite useless. In March 1793, the premises were worth nothing; but the landlord, if he had insisted on the rigour of the law, might have obliged the plaintiff to pay rent for nothing, during the remainder of the term; and then the plaintiff would have been glad to have delivered up the premises. Therefore he left it to the jury to consider whether it was not to be presumed that the tenant had abandoned the lease at the time of the fire; and accordingly the defendant had a verdict. Ante.

11. [Again, in Baker *v.* Holtpzaffell, where the lessee held under an agreement for a lease by which he agreed to pay rent 4 Taun. 45. Infra. s. 15.

during the demise of the term specified in the agreement, the premises were burnt down. Mansfield C. J. held the tenant liable to pay the rent.

12. But the supposed hardship of the case that a man should pay rent for what he cannot enjoy, and that occasioned by an accident which he did not undertake to stand to, seems to have occasioned the strong opinion, expressed by Lord Northington in Brown *v.* Quilter, that although there might be no defence to an action at law, yet there was good ground for an injunction, until the house was built. In Camden *v.* Morton his Lordship adhered to the same opinion.

Ambl. 619.

2 Eden. 219.

13. In the subsequent case of Steele *v.* Wright, Lord Apsley decided that though the landlord was not bound to rebuild, yet the tenant was neither obliged to rebuild, nor to pay the rent, until the premises were rebuilt.

1 T. R. 706.

14. But the three preceding authorities appear to have been overruled in Hare *v.* Groves. There the lessee covenanted to repair, "damage by fire only excepted." The premises were burnt down, and the lessor refused to rebuild the premises, or take a surrender of the lease, and commenced an action at law on the covenant for non-payment of the rent accruing since the fire. A bill was filed for an injunction, and to compel the lessor either to accept a surrender or to rebuild. The Court of Exchequer, after full consideration, decided that as there was no defence against an action at law, so the tenant had no remedy in Equity against the effect of the substantial independent covenant to repair.

3 Anst. 687.

15. In Holtpzaffell *v.* Baker, Lord Eldon followed the last case. There the rent had been regularly paid to Michaelmas 1809; on the 15th of January 1810, the premises were burnt down and continued in a state of ruin, so that the tenant was deprived of the occupation and use of them. The defendant having brought his action for a year and a half's rent from Michaelmas 1809 to Lady-day 1811, the plaintiff filed his bill, praying that the defendant might rebuild the premises, and for an injunction against proceedings at law. The preceding authorities were discussed in the argument, and Lord Eldon decided that the tenant had no equity, and that the injunction which had been obtained for want of an answer should be dissolved.]

18 Ves. 115.

Supr. s. 11.

Discharge of rent-charge.

16. With respect to the discharge of a rent-charge, it is laid

down by Littleton, s. 222. that if a man has a rent-charge issuing out of certain lands, and purchases any part of them, the rent-charge is extinct. Lord Coke says, the reason is, because the rent is entire, and against common right, and issuing out of every part of the land; therefore, by purchase of part, it is extinct in the whole. 1 Inst. 147. b.

17. Lord C. B. Gilbert observes, that the reason of the difference between this case and that of the purchase of part of the lands out of which a rent-service issues is, because, in the case of a rent-charge, there is no connexion of tenure between the grantor and grantee, as there is in the case of a rent-service. And as grants of rent-charges were of no benefit to the public, and afforded no additional strength or protection to the kingdom, the law carried them into execution only so far as they could take effect according to their original intention; therefore where the grantee, by his own act, prevented the operation of the grant, according to its original intention, the whole grant determined. Rents, 152.

18. If the grantee of a rent-charge purchases parcel of the land, and the grantor, by his deed, reciting the said purchase of part, grants that he may distrain for the said rent in the residue of the land, this amounts to a new grant. 1 Inst 147 b.

19. If a person having a rent-charge issuing out of three acres of land, releases all his right in one acre, the rent is extinct; because all issues out of every part, and it cannot be apportioned. But if a person has a rent-charge of 20s., he may release to the tenant of the land 10s., and reserve part; for the grantee deals only with that which is his own, namely, the rent, and not with the land. 18 Vin. Ab. 504. 1 Inst. 148 a. 3 Vin. Ab. 10, 11.

20. It frequently happens in practice, that a person entitled to a rent-charge is disposed to exonerate part of the lands from the payment of it: but, in consequence of the above doctrine, difficulties have arisen in settling the mode of effecting such exoneration, without risking the entire extinguishment of the rent-charge. The common mode has been for the grantee of the rent-charge to join in the conveyance of the lands, which operates as a release of the lands conveyed, from the payment of the rent-charge; and to insert a proviso in the deed, that the other lands shall continue subject to the rent-charge. And it is held, that this proviso operates as a new grant of the rent-charge. To this

mode, however, there is a material objection: for such new grant would be subject to any incumbrances created subsequent to the grant of the original rent-charge, but prior to the conveyance of part of the lands.

Butler *v.* Mannings, Noy 5. Deux *v.* Jefferies, Cro. Eliz. 352. Ambl. 250.

21. Another mode is sometimes adopted: that is, to obtain a covenant from the grantee of the rent-charge, that he will not distrain or enter on the premises conveyed for the recovery of his rent-charge. But there is a case, in which one of the judges held that such a covenant would operate as a release of the whole rent-charge, though Anderson was of a different opinion.

Apportionment of rent-charge.

Gilb. Rents. 163. 18 Vin. Ab. 504.

22. There are many cases in which a rent-charge or a rent-service may be apportioned, as well by the act of the party, as by the act of the law. Thus, where the grantee of a rent-charge releases part of the rent to the tenant, such release will not extinguish the whole rent: but the part not released will still continue.

Idem.

23. So if the grantee of a rent-charge conveys part of it to a stranger, and the tenant of the land attorns, such grant will not extinguish the residue, because such release or disposition makes no alteration in the original grant; nor does it defeat the intention of it, as the purchase of part of the land does, for the whole rent is still issuable out of the whole land, and charged according to the original intention of the grant. Besides, since the law allowed of such grants, and thereby established this kind of property, it would have been unreasonable and severe to hinder the proprietors of rent-charges from dividing them, for the promotion of their children.

Rents 164. Cro. Eliz. 742.

24. Lord Ch. B. Gilbert observes, that the objection which has been made to this kind of apportionment of rent charges is this: that the tenant would be thereby exposed to several suits and distresses for a thing, which, in its original creation, was entire. But the answer is obvious, that it is in the tenant's choice whether he will submit himself to this inconvenience by his attornment to the grant of a part of the rent-charge. Now the necessity of an attornment is taken away: but still a division or apportionment of a rent-charge, by a conveyance of part of it to a stranger, is held good.

Wotton *v.* Shirt, Cro. Eliz. 742. Gilb. Rents 165.

25. A rent-charge may be divided and apportioned by act in law; for a part of a rent may be extended by a *scire facias*. And though it was said that the tenant was thereby, without his at-

tornment, made liable to several suits and distresses, yet it was an inconvenience which he might avoid by punctual payment of his rent.

26. If part of the lands subject to a rent-charge descend to the grantee, it shall be apportioned according to the value of the land; for in this case the grantee is perfectly passive, and does not concur by any act of his to defeat the intention of the grant. Lit. s. 224. Gilb. Rents 156.

27. With respect to the apportionment of rent-service it has been stated in sect. 5. that where a person, having a rent-service, purchases part of the land out of which it issues, the rent-service is not extinguished, but shall be apportioned according to the value of the land; so that the purchase shall operate as a discharge to the tenant for so much of the rent as is equal to the value of the land purchased. Apportionment of rent-service at law.

28. This rule only applies to such services as are divisible in their nature, such as rent; for with respect to indivisible services, as where the tenant is bound to render a horse, a hawk, or such like, though the lord purchases part of the tenancy, yet, as there can be no apportionment of these services, they shall become extinct, and the tenant will be discharged from them: for the whole tenancy being equally chargeable, the lord by his own act shall not discharge part, and throw the whole burthen upon the residue, for his own private benefit and advantage. Lit. s. 222. Gilb. 165.

29. Where such entire service is for the benefit of the public, as castle guard, cornage, &c., or to repair a bridge or way, or to keep a beacon, or for the advancement of justice; or if it be a work of piety; in all such cases the tenant is still chargeable for the whole services: for the thing is in its nature indivisible; and the whole shall not be extinguished, because the public has an interest in such services; and shall not be prejudiced by the private transactions of the parties. 1 Inst. 149 a. Gilb. 166.

30. If there be lord and tenant by fealty and heriot service, and the lord purchases part of the land, the heriot service is extinct, because it is entire and valuable. It is otherwise in the case of heriot custom, as has been already shewn. But where part of the tenancy comes to the lord by descent, the services are not extinct, though indivisible. 1 Inst. 149 b. Talbot's case, 8 Rep. 104. Tit. 10. c. 4. s. 54. Gilb. Rents, 167.

31. It was formerly doubted whether a rent-service incident to a reversion might be apportioned by a grant of part of the re- Idem, 172.

version; or whether the whole rent should not be extinct and lost. For since the reversion and rent incident thereto were entire in their creation, it was thought hard that they should be divided by the act of the lessor, and the tenant thereby made liable to several actions and distresses.

Collins *v.* Harding, 13 Rep. 57. Gilb. 173.

32. It has, however, been long settled, that where part of the reversion is granted away, the rent shall be apportioned; for the rent is incident to the reversion. Therefore if a person makes a lease of three acres of land, reserving three shillings rent; as he may dispose of the whole reversion; so may he also dispose of any part of it, since it is a thing in its nature severable: and the rent, as incident to the reversion, may be also divided, because that being a retribution for the land, ought to be paid to those who are to have the land upon the expiration of the lease. Hence it is that the rent, or a proportionable part thereof, passes immediately with the reversion, without any express mention being made of it in the grant.

1 Ja. & Wal. 184. 3 B. & Ald. 876.

Ards *v.* Watkin, Cro. Eliz. 637, 651.

33. A rent-service may also be apportioned by a devise of it to several persons. As where A. leased to B. rendering 10*l.* rent; and then devised 6*l.*, part thereof to C., D., and E. severally, to each of them a third part; it was resolved, that an action of debt was maintainable by one of the devisees. For though the lessee by this means became subject to several distresses and actions, without attornment, yet these were mischiefs which he might prevent, by a punctual payment of his rent.

Rushden's case. Dy. 4. b. Broom *v.* Hore, Cro. Eliz. 633. Stevenson *v.* Lambard, 2 East. 580.

34. [But rent reserved on a lease for years is not apportioned by the alienation of the lessee; for the lessee, although he alien the whole or part of his estate, will nevertheless continue liable for the whole of the rent. The effect of assignment by the lessee is not to discharge himself, but will give the lessor a double remedy for his rent; one against the lessee for the whole, in respect of his privity of contract, and another against the assignee of his part, in respect of his privity of estate.]

Ante s. 2.

35. It has been stated that a rent-service is discharged by the eviction of the tenant out of the whole land, from which the rent issues; but where only part of the land is evicted, the rent will be apportioned.

1 Inst. 148 b. 2 East. 580.

36. Where a right of common is established on land demised, the rent cannot be apportioned [illegible], as there is no eviction. And in a case of this kind [illegible]rt of Chancery refused to

apportion the rent, because the lands were worth more than what was reserved.

37. The plaintiff was lessee of divers lands, whereupon an entire rent was reserved; afterwards the inhabitants of the town where part of the land lay claimed a right of common there, and upon a trial established it. This not being an eviction of the land at law, because the soil was not recovered, there could be no apportionment of the rent at law; therefore, a bill was brought to have the rent apportioned in equity. Serjeant Maynard insisted that such an apportionment had frequently been decreed in equity; but it appearing that the lands were worth the rent reserved, and more, the Court would not decree an apportionment. Jew *v.* Thirkwell, 1 Cha. Ca. 31.

38. With respect to those cases where a rent-service shall be apportioned by the act of God, it is said in Roll's Abridgement, that if a man leases land for life or years, rendering rent, and after part of the land is surrounded by water, this will not make any apportionment of the rent, because the soil remains, and may be regained again; but if part of the land be surrounded or covered with the sea, this will make an apportionment of the rent; for though the soil remains to the lessee, yet, by ordinary intendment, there is no probability of regaining it. Vol. 1. 236.

39. If land demised be burnt by wild fire, yet the rent shall not be apportioned, for the land remains notwithstanding; and cannot be so consumed but that some benefit may be made of it. Idem.

40. A rent-service may also be apportioned by act of law; as where a moiety of a reversion is extended upon a writ of *elegit*, the rent shall be apportioned, and the lessor shall have half of it, as incident to the reversion that remains in him. Cambell's case, 1 Roll. Ab. 237. Tit. 14.

41. So where a husband leases for years, reserving rent, and dies, and his widow recovers a third part of the reversion for her dower, she shall have the same proportion of the rent; for in all these cases the law apportions the rent, in the same manner as it disposes of the reversion. Idem.

42. [So where the reversion descends or devolves upon different classes of representatives of the lessor: as where one, seised in fee of Black Acre, and lessee for twenty years of White Acre, leases both by one demise for ten years, rendering an entire rent, and dies; whereupon the reversion of Black Acre descends upon Moody *v.* Garnon, 1 Rol. Abr. 237. (D) 5. S. C. 3 Bulstrode, 153.

his heir, and that of White Acre to his executor; the rent shall be apportioned to the different reversions.

Rushden's case, Dy. 4. b. Ewer v. Moyle, Cro. Eliz. 771.

43. Again where one leases one acre of borough English, and another of gavelkind tenure, by one demise at an entire rent, and having issue two sons, dies; the rent shall be apportioned according to the course of descent.]

Apportionment by statute. 11 Geo. 2. Jenner v. Morgan, 1 P. Wms. 392.

44. At common law, if a tenant for life died before the day on which the rent became due, where the lease determined by the death of the tenant for life, his executors could not claim an apportionment of the rent; nor could the remainder-man or reversioner claim that part of it which accrued during the life of the tenant for life: so that the tenant paid nothing.

45. This defect in the law produced the statute 11 Geo. 2. c. 19. s. 15. by which it is enacted, "That where any tenant for life shall die before or on the day on which any rent was reserved or made payable, upon any demise or lease of lands, tenements, or hereditaments, which determined on the death of such tenant for life; that the executors or administrators of such tenant for life shall and may, in an action on the case, recover of and from such under-tenant or under-tenants of such lands, &c. if such tenant for life die on the day on which the same was made payable, the whole; or if before such day, then a proportion of such rent, according to the time such tenant for life lived of the last year or quarter of a year, or other time in which the said rent was growing due as aforesaid; making all just allowances, or a proportionable part thereof accordingly."

46. This statute only extends to rents reserved on leases which determine by the death of the lessor; for where the lease does not determine on that event, the person in remainder or reversion becomes entitled to the whole rent due from the day of payment preceding the death of the tenant for life.

47. [It does not seem to be settled whether the provisions of the above statute, 11 Geo. 2. c. 19. extend to a lease (not pursuant to the enabling statute) made by tenant in tail. The cases which bear upon the point have arisen between the executors of the tenant in tail and the remainder-man, and not between the former and the lessee; and they all appear to have turned upon the fact of actual payment of the rent by the lessee to the remainder-man.]

48. In Pagett *v.* Gee, which was decided in Chancery in 1753, the tenant in tail, with remainder to the defendant in fee, leased for years; and died without issue a week before the day of payment of the half-year's rent. The lessee, at the day, paid all the half-year's rent to the defendant; against whom the executor of the tenant in tail brought his bill for an apportionment of the rent. Lord Chancellor Hardwicke observed—"This point has never been determined; but this is so strong a case, that I shall make it a precedent. There are two grounds for relief in equity. The first arises on the statute 11 Geo. 2.: the second arises on the tenant's having submitted to pay the rent to the defendant. The relief, arising upon the statute, is either from the strict legal construction, or equity formed upon the reason of it. And here it is proper to consider, what the mischief was before the act, and what remedy is provided at common law. If tenant for life, or any who had a determinate estate, died but a day before the rent reserved on a lease of his became due the rent was lost: for no one was entitled to recover it. His representatives could not, because they could only bring an action for the use and occupation; and that would not lie where there was a lease, but debt or covenant: nor could the remainder-man, because it did not accrue in his time. Now, this act appoints the apportioning the rent, and gives the remedy. But there are two descriptions of persons, to whose executors the remedy is given: in the preamble it is one, having only an estate for life; in the enacting part, it is tenant for life. Now, tenant in tail comes expressly within the mischief. I do not know how the Judges at common law would construe it: but I should be inclined in this Court to extend it to them. I should make no doubt, where this is the case of tenant in tail after possibility of issue extinct: for he is considered, in many respects, as tenant for life only. He cannot suffer a recovery: he may be enjoined from committing waste, such as hurts the inheritance, as felling timber; though not for committing common waste, being considered as to that as tenant in tail. Where it is the case of tenant for years determinable on lives, he certainly must be included within the act; though it says only tenant for life: it would be playing with the words to say otherwise. These cases shew the necessity of construing this act beyond the words. Tenant in tail has certainly

1 Burn. Jus. 483. Amb. 198.

a larger estate than a mere tenant for life; for he has the inheritance in him, and may, when he pleases, turn it into a fee: but, if he does not, at the instant of his death he has but an interest for life. Such, too, is the case of a wife, tenant in tail *ex provisione mariti:* upon this point I give no absolute opinion. As to the equity arising from this statute, I know no better rule than this; *equitas sequitur legem:* where equity finds a rule of law agreeable to conscience, it pursues the sense of it to analogous cases. If it does so as to the maxims of the common law, why not as to the reasons of the acts of parliament? Nay, it has actually done so on the statute of Forcible Entry, on which this Court grounds bills, not only to remove the force, but also to quit the possession. This Court extends the reason to equitable interests: but I ground my opinion, in this case, on the tenant's having submitted to pay the rent. He has held himself bound in conscience, for the use and occupation of the land the last half year; he paid it to the defendant, which he was not bound to do in law. And, in such a case, the person he pays it to shall be accountable, and considered as receiving it for those who are in equity entitled thereto. The division must be that prescribed by the statute; and then the plaintiff is entitled to such a proportion of the rent, as accrued during the testator's life." Accordingly it was so decreed.

2 Bro. C. C. 662.

49. [The next case is Whitfield *v.* Pinder, which was decided in the Common Pleas (1781), and is shortly cited in Vernon *v.* Vernon. There the tenant in tail made a lease, void against the remainder-man, reserving rent, and died three weeks after the rent-day: it was decided that the rent should be apportioned. From this short statement, unexplained, it might be inferred that the case decided the point, that a tenant in tail is within the meaning of the statute, being virtually a tenant for life if he dies without barring the entail: but from the observations of Lord Eldon, in Hawkins *v.* Kelly, it would seem that the question in Whitfield *v.* Pinder turned upon the same point as Pagett *v.* Gee, (namely), the actual payment of the rent by the lessee to the remainder-man; and, consequently, that Whitfield *v.* Pinder must have been an action by the executor of the deceased tenant in tail against the remainder-man, for the executor's portion of

8 Ves. 312.

the rent, as money had and received by the remainder-man for his (the executor's) use.]

50. In the subsequent case, of Vernon *v.* Vernon, where a person held from year to year under a tenant in tail, the Court of Chancery decreed an apportionment. 2 Bro. C. C. 659.

51. There H. Vernon being tenant in tail of estates in the county of Sussex, died on the 17th of March, an infant, by which John Vernon, one of the plaintiffs, became tenant in tail of the estate: part of the lands was occupied by persons holding from year to year, under the guardian; and their rents were payable at Lady and Michaelmas-day, which demises expired by the death of H. Vernon. These rents having been paid to the receiver, the question was, whether the administratrix of H. Vernon was entitled to a proportion of the rents, or the remainder-man was entitled to the whole.

The Master reported, that a proportion of the rent was due to H. Vernon on the day of his death: to which the remainder-man took an exception, that he ought to have certified that no sum was due to H. Vernon on the day of his death, in regard that he was tenant in tail of the estates of which the Master certified the said rents or proportions to be due.

Lord Thurlow—"The case of Pagett and Gee seems rather to to be a decision what the statute ought to have done than what it has done: but the question here seems to turn on another ground; that the tenant holding from year to year, or from period to period, from a guardian, without lease or covenant, cannot be allowed to raise an implication in his own favour, that he should hold without paying rent to anybody." The exception to the Master's report was over-ruled.

52. [In Hawkins *v.* Kelly, a lease of tithes was granted for years by a rector, reserving a rent payable annually; the lease ceased on his death, and the succeeding incumbent received from the lessee a sum of money as the rent due for the whole year, in the course of which the late rector died: it was decreed that the rent should be apportioned. Lord Eldon fully recognized the case of Pagett *v.* Gee, referring the decision to the principle before noticed. 8 Ves. 308. See also Aynesly *v.* Wordsworth, 2 Ves. & Bea. 331.

53. In Clarkson *v.* Lord Scarborough, where a tenant for life, with leasing power, having granted leases from year to year, some 1 Swan. 354. note.

See also Wykham *v.* Wykham, 3 Taunt. 331.

by parol and some in writing, but not conformable to the power, died before the expiration of the year, it was decided that the rents were apportionable.

1 Swan. 337.

54. A similar decision was made in *ex-parte* Smyth, where a parol demise from year to year was made by tenant for life, who had power to lease by deed.]

TITLE XXIX.

DESCENT.

CHAP. I.

Title to Things Real.

CHAP. II.

Descent and Consanguinity.

CHAP. III.

Rules or Canons of Descent.

CHAP. IV.

Descent of Estates in Remainder and Reversion.

CHAP. V.

Descent by Statute and Custom.

CHAP. I.

Title to Things Real.

SECT. 2. *Description of a Title.*
3. *Possession.*
4. *Effect of an Entry.*
6. *Right of Possession.*
9. *Apparent or Actual.*
12. *Right of Property.*
13. *Discontinuance of Estates.*
16. *What constitutes a complete Title.*
18. *Remitter.*

SECTION I.

HAVING treated of the several kinds of real property, both corporeal and incorporeal, and of the estates that may be had therein, it will now be necessary to consider of the title to real property, with the manner in which it may be acquired or lost.

2. A title is thus described by Lord Coke, *Titulus est justa causa possidendi id quod nostrum est*, or it is the means whereby the owner of the lands or other real property has the just and

Description of a title. 1 Inst. 345. b.

2 Comm. c. 13. legal possession and enjoyment of it. And Sir W. Blackstone observes that there are several stages or degrees requisite to form a complete title to lands and tenements.

Possession. 3. The first degree of title is the bare possession, or actual occupation, of the estate; without any apparent right, or any pretence of right to hold and continue such possession. This may happen where one man disseises another; or where, after the death of the ancestor, and before the entry of the heir, a stranger abates, and holds out the heir. In these cases the disseisor or abator has only a mere naked possession, which the rightful owner may defeat by an entry on the land: but in the mean time till some act is done by the rightful owner to divest this possession, and assert his title, such actual possession is *primâ facie* evidence of a legal title in the possessor; and it may by length of time, and negligence of him who hath the right, by degrees ripen into a perfect and indefeasible title. At all events, without such actual possession, no title can be completely good. (*a*)

Effect of an Entry. 4. The necessity of an entry by the heir, upon the death of the ancestor, or, where that is prevented, of a continual claim, (*b*) has been already stated. In the case of a disseisin or ouster of the freehold, there must also be an entry; and if there be two disseisors, the disseisee must make his entry on both; or if one disseisor has conveyed the lands, with livery, to two or three persons, an entry must be made on each of them: but if the disseisor has let the lands to several persons for years only, an entry on one of the lessees, in the name of the whole, will be sufficient to revest all.

Tit. 1. s. 22.

1 Inst. 252 b.

5. The effect of an entry or claim [previously to the late statute of limitations], was to put the person who entered or claimed, into the actual possession and seisin in deed of the lands. Thus Littleton says—"By such entry he shall have as good a possession and seisin of all the lands and tenements whereof he hath title of entry, as if he had entered in deed into every parcel." And speaking of continual claim, he says—"Presently by such claim he hath a possession and seisin in the lands, as well as if

s. 417, 418.

s. 419.

(*a*) [By stat. 3 & 4 Will. 4. c. 27. s. 14. It is enacted that any acknowledgment of title given in writing to the person entitled, or to his agent shall be deemed equivalent to possession or receipt of rent at the time of such acknowledgment.]

(*b*) [Abolished, Stat. 3 & 4 Will. 4. c. 27. s. 11.]

he had entered in deed; although he never had possession or seisin of the same lands, or tenements before the said claim." (*a*)

Right of possession.

6. The next step to a good and perfect title is the right of possession, which may exist in one man, while the actual possession is in another. Thus in the case of a disseisin, abatement, or intrusion, the right of possession is in the disseisee or the person on whom the abatement or intrusion has been effected, who may exert it whenever he thinks proper, by an entry; and the actual possession is in the disseisor, abator, or intruder.

1 Inst. 237. b. Plowd. 545. 2 Saund. R. 7 a.

7. In the case of a disseisin, abatement or intrusion, the descent of the lands to the heir of the disseisor or abator or intruder, [before the recent statute of limitations] tolled, that is, took away the entry of disseisee, &c.; (*b*) for the law presumed that the possession, which was transmitted from the ancestor to the heir was rightful, until the contrary was shewn; so that in general no person could recover possession by mere entry on lands, which another had by descent. It is, however, enacted by the statute 32 Hen. 8. c. 33. that the dying seised of any disseisor, of or in any manors, &c. having no right or title therein, shall not be taken or deemed to be such descent in law, for to toll or take away the entry of any persons, except that such disseisor hath had the peaceable possession of such manors, &c. whereof he shall so die seised, by the space of five years next after the disseisin, without entry or continual claim.

Tit. 31. c. 2.

Lit. s. 402.

8. Where a person who had a right of entry was under any legal disability, such as infancy, coverture, imprisonment, insanity, or absence from the realm, a descent would not take away the right of entry. (*c*)

Apparent or actual.

9. The right of possession is of two sorts; an apparent right of possession, which may be defeated by proving a better; and an actual right of possession, which will stand the test against all opponents. Thus, where a person was disseised, the disseisor had only the naked possession, because the

Gilb. Ten. 21. Lit. s. 385. 1 Salk. 685.

(*a*) [Abolished by stat. 3 & 4 Will. 4. c. 27. s. 11. which also enacts s. 39. that no descent cast after the 31st December, 1833, shall toll or defeat a right of entry or action for the recovery of land; and it also enacts, s. 10, That by mere entry no person shall be deemed to have been in possession within the meaning of that act.]

(*b*) [Abolished by the same stat. s. 11.]

(*c*) [See the same stat. ss. 14, 15, 16.]

disseisee might enter and evict him: but against all other persons, the disseisor had a right; and in this respect only could be said to have the right of possession; for, in respect of the disseisee, he had no right at all. When a descent was cast, the heir of the disseisor acquired the *jus possessionis*, because the disseisee could not enter upon his possession, and evict him, but was put to his real action.

Ante, s. 7.

Smith v. Tyndal, 2 Salk. 685.

10. If a disseisor died after five years' quiet possession, and the disseisee entered, the heir of the disseisor might maintain an ejectment; for the right of possession belonged to him though the mere right was in the disseisee. (*a*)

11. Where the person who had the actual right of possession made his claim, and brought his action, within the time prescribed by the former statutes of Limitation, and could prove by what unlawful means the person in possession acquired his seisin, he would then, by judgment of law, recover that possession to which he had such actual right. But if he omitted to bring his possessory action within the limited time, his adversary might imperceptibly gain an actual right of possession.

Tit. 31. c. 2.

11 Mod. 104.

Right of property.

12. When the right of possession was gained, the party kept out of possession had nothing left in him but the mere right of property, or *jus proprietatis*, without either possession, or the right of possession; and his estate was then said to be devested and turned to a right. It was devested because the right owner was turned out of possession; and it was turned to a right, because the right of possession and consequently the right of entry was lost; and nothing was left but the *jus merum*, or mere right of property; which could not be regained by a possessory, but only by a real action. (*b*)

Discontinuance of estates.

13. [Prior to the recent statute of limitations] where the right of entry into lands was lost, and the person entitled could only recover by a real action, the estate was said to be discontinued. Thus Lord Coke says a discontinuance of estate in lands or tenements is properly, in legal understanding, an alienation made or

1 Inst. 325 a.

(*a*) [By stat. 3 & 4 Will. 4. c. 27. s. 39. it is enacted, that no descent cast after the 31st December, 1833, shall toll or defeat a right of entry or action for the recovery of land.]

(*b*) [See section 36 of the late stat. of limitations, s. 36, by which all real and mixed actions are abolished, except a writ of right of Dower, or writ of Dower *unde nihil habet*, a *quare impedit*, or an ejectment.]

suffered by tenant in tail, or any that is seised *in auter droit*, whereby the issue in tail or heir or successor, or those in remainder or reversion, are driven to their action, and cannot enter.

14. The instances of discontinuance mentioned by Littleton, s. 593, are, 1. Where an abbot aliened the lands whereof he was seised *jure ecclesiæ;* in which case his successor could not enter into them, although the right was in him, but was put to his action.—2. Where a man seised in right of his wife enfeoffed another and died; the wife could not enter, but was put to her action. 3. Where a tenant in tail of land enfeoffs another and has issue, and dies; the issue may not enter into the land, albeit he hath right and title to it, but is put to his action.

15. In consequence of this doctrine it was long settled, that where a tenant in tail discontinued the estate tail, which he might do by feoffment or fine, the person to whom the estate tail was transferred by these assurances acquired the right of possession; and nothing remained in the issue in tail but the mere right of property.(*a*) Tit. 2. c. 2.

16. The union of the possession, the right of possession, and the right of property, constitute a complete title to lands, tenements, and hereditaments. For it is an ancient maxim of law that no title is completely good unless the right of possession be joined with the right of property, which is then denominated a double right. And when to this double right the actual possession is also united; where there is, according to the expression of Fleta, *juris et seisinæ conjunctio;* then, and then only, is the title completely legal. What constitutes a complete title. 1 Inst. 266 a.

17. Lord Coke has thus stated the whole of this doctrine.— "It is to be known that there is *jus proprietatis*, a right of ownership; *jus possessionis*, a right of seisin or possession; and *jus proprietatis et possessionis*, a right both of property and possession. And this is anciently called *jus duplicatum*, or *droit droit*. For example, a man may be disseised of an acre of land, the disseisee hath *jus proprietatis*, the disseisor hath *jus possessionis;* and if the disseisee release to the disseisor, he hath *jus proprietatis et possessionis.*" Idem.

(*a*) [But now by the recent statute of limitations 3 & 4 Will. 4. c. 27. s. 39. it is enacted that no discontinuance after the 31st December, 1833, shall defeat any right of entry or action.]

Remitter.

18. Littleton says, s. 659, that where a man has two titles to lands, one a more ancient, and the other a later title, if he comes to the land by the later title, yet the law will adjudge him in by force of the elder title, because it is the most sure. And when a person is adjudged in by force of his elder title, this is said to be a remitter in him; as if tenant in tail discontinues his estate; afterwards disseises the discontinuee, and so dies seised, whereby the tenements descend to his issue, or cousin, inheritable by force of the entail, such issue or cousin is remitted to the estate tail, as his elder title. For if he should be in by force of the descent, then the discontinuee might have a writ of entry *sur disseisin* (*a*) against him, and should recover the tenements: but inasmuch as he is in his remitter, by force of the tail, the title and interest of the discontinuee is taken away and defeated.

Id. s. 661.

19. A principal cause why such heir, in the case aforesaid, and in other like cases, shall be said in his remitter, is, because there is not any person against whom he may sue his writ of formedon; for against himself he cannot sue, and he cannot sue against any other, none other being tenant of the freehold. For this cause the law doth adjudge him in his remitter, *scilicet*, in such plight as if he had lawfully recovered the same land against another.

3 Com. 20. Id. 190.

20. Sir W. Blackstone has observed, that if the subsequent estate or right of possession be gained by a man's own act or consent, as by immediate purchase, being of full age, he shall not be remitted. For the taking such subsequent estate was his own folly, and shall be looked upon as a waiver of his prior right; therefore it is to be observed, that to every remitter there are regularly these incidents. An ancient right, and a new defeasible estate of freehold, uniting in one and the same person; which defeasible estate must be cast upon the tenant, not gained by his own act or folly.

1 Inst. 349 b. Moo. 115.

21. Lord Coke, however, says, that a man shall not be remitted to a right remediless, for the which he can have no action; as if the issue in tail be barred by the fine or warranty (*a*) of his ancestor, and the freehold is afterwards cast upon him, he shall

(*a*) [Now abolished by stat. 3 & 4 Will. 4. c. 27. s. 36. See also ss. 37. 38.]

(*b*) [No bar to a right of entry or action now, by stat. 3 & 4 Will. 4. c. 27. s. 39.]

not be remitted to his estate tail, because he could not have recovered it by an action. Vide 1 Saunders' Uses, c. 2. s. 6.

22. The modes of acquiring a title to real property are two only; descent and purchase. The former, where the title is vested in a person by the single operation of law; the latter, where the title is vested by the person's own act and agreement. 1 Inst. 18 b.

CHAP. II.

Descent and Consanguinity.

SECT. 1. *Nature of Descent.*
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SECTION I.

Nature of descent.

DESCENT or hereditary succession is the title whereby a person on the death of his ancestor acquires his estate, as his heir at law. An heir, therefore, is he upon whom the law casts the estate immediately on the death of the ancestor; and an estate so descended on the heir is, in law, called the inheritance.

2. Although the right of inheriting be known to the laws of every civilized country, and is founded on the best principles of reason, yet it is not derived from natural law, or which can belong to any man in a state of nature; from which it follows that the numerous and arbitrary rules by which its course is either directed or interrupted can never properly be esteemed or objected to, as violations of natural justice. Our laws of descent are derived from feudal principles, and differ essentially from the Roman law of succession; for with us the heir succeeds as related to the ancestor in blood, and designated to inherit the estate, by the terms of the grant.

Dissert. c. 1.

What goes to the heir. Tit. 1.

3. Not only every thing which falls under the denomination of real estate descends to the heir, but also heir looms, and all such other chattels as are annexed to, or connected with the freehold; as wainscots, benches, doors, windows, and the like.

4. Every species of tree, whether timber or not, standing on the land at the death of the ancestor, together with the grass actually growing, though ripe for cutting, descend to the heir.

But corn and every other vegetable produced annually by labour and cultivation, goes to the executor or administrator of the ancestor, as a compensation for the expense of raising them.

Consanguinity.

5. The doctrine of descents, or law of inheritance in fee simple, depends on the nature of kindred, and the several degrees of consanguinity. It will therefore be first necessary to state the true notion of this kindred or alliance in blood. Consanguinity or kindred is defined to be *vinculum personarum ab eodem stipite descendentium*; the connection or relation of persons descended from the same stock; it is either lineal or collateral. Lineal consanguinity is that which subsists between persons of whom one is descended in a right line from the other; as between father, grandfather, and great-grandfather. Every generation in this direct lineal consanguinity constitutes a degree, reckoning either upwards or downwards. Collateral consanguinity is that which subsists between persons lineally descended from the same ancestor, who is the *stirps*, trunk, or common stock, but who do not descend the one from the other; as brothers, and the children, grandchildren, &c. of brothers.

1 Inst. 23 b.

6. The method of computing the degrees of consanguinity by the canon law, which our law has adopted, is as follows:—We begin at the common ancestor, and reckon downwards; and in whatever degree the two persons, or the most remote of them, is distant from the common ancestor, that is the degree in which they are said to be related.

Who may be heirs.

7. With respect to the persons who are capable of claiming an estate in fee simple, as the heirs of one who died seised thereof, they must be first legitimate; secondly, natural-born subjects, or naturalized, or made denizens; thirdly, not attainted of treason or felony, or claim through any ancestor who was attainted of treason or felony.

They must be legitimate.

8. No person can succeed to an estate as heir, who is not born in lawful matrimony; for it is a maxim of law, that *hæres legitimus est quem nuptiæ demonstrant*; and a bastard being *filius nullius*, can neither inherit from his father nor mother; consequently, can have no heirs but his own children.

1 Inst. 126. a. n. 2.

9. By the old law, if the husband was within the four seas, and his wife had issue, no evidence would be admitted to prove such issue a bastard, unless the husband was incapable of procreation. But Mr. Hargrave has observed, that this was never

an universal rule; and that it has been long settled, that not only proof of being out of the kingdom, but also every other kind of evidence tending to prove the impossibility, or even improbability, of the husband's being the father, is admissible. And in the late claim to the earldom of Banbury, the House of Lords adhered to this principle.

Goodright v. Saul, 4 Term R. 356. Tit. 26. c. 3. Head v. Head, 1 Sim. & Stu. 150.

10. With respect to posthumous children, the rule formerly was, that they must be born within nine months, or forty weeks, after the death of the husband. But now the Courts consider nine months merely as the usual time, and do not decline exercising the discretion of allowing a longer space, where the opinion of physicians or the circumstances of the case have required it. In a late instance, upon an issue directed out of Chancery, a child born forty-three weeks, except one day, after the husband's death, was found to be legitimate.

1 Inst. 123 b. n. 1. Hargrave's Juris. Exer. Vol. III. 409.

Foster v. Cook, 3 Bro. C.C. 347.

11. Where a widow is suspected of feigning herself pregnant, with a view to produce a supposititious child; the presumptive heir may have a writ *de ventre inspiciendo*, to examine whether she be pregnant or not; and if she be pregnant, to keep her under a proper restraint, till she be delivered.

1 Inst 8. b. n. 1. 123 b. n. 1.

And natural-born-subjects.

12. No person is capable of inheriting lands unless he is a natural-born subject; or naturalized by act of parliament, or made a denizen by the King's letters patent. By the common law every person born out of the King's dominion or allegiance was deemed an alien. But by the statute 25 Edw. 3. s. 2. it was enacted that all children born abroad, whose fathers and mothers were, at the time of their birth in allegiance to the King, and the mother had passed the seas with her husband's consent, might inherit, as if born in England.

13. By the statute 7 Ann. c. 5. it is enacted, that the children of all natural-born subjects, born out of the allegiance of her Majesty, her heirs or successors, shall be deemed to be natural-born subjects. And by the statute 4 Geo. 2. c. 21. reciting that doubts had arisen respecting the construction of the statute 7 Ann., it is enacted that all children born out of the ligeance of the Crown of England, or which should be born out of such ligeance, whose fathers were or should be natural-born subjects at the time of the birth of such children, should by virtue of the said act of 7 Ann. and of this act, be adjudged to be natural-born subjects provided their fathers were not attainted of high

treason, or liable to the penalties of high treason, in case of their returning to Great Britain or Ireland, or in the service of any state in enmity with the Crown of England.

14. By the statute 13 Geo. 3. c. 21. it is enacted, that all persons born out of the ligeance of the Crown of England, whose fathers were or should be, by virtue of the statutes 7 Ann. and 4 Geo. 2., entitled to the rights and privileges of natural-born subjects, should be deemed natural-born subjects. In consequence of these statutes, all persons born out of the King's ligeance whose fathers and grandfathers were natural-born subjects, are held to be natural-born subjects, and as such are capable of inheriting.

15. It was held in the reign of Charles I., that under the statute 25 Edw. 3. the child of an English merchant, born abroad, whose mother was an alien, should inherit. This determination was founded on the principle that the words of the statute 25 Edw. 3. *whose fathers and mothers* should be construed in the disjunctive. But this mode of construction has been denied in the following case. Bacon v. Bacon, Cro. Car. 601.

16. Henrietta Knight, a natural-born subject, quitted the kingdom, and married Count Duroure, an alien, by whom she had a son, born abroad. The question was, whether this son was capable of inheriting lands in England, as heir to his mother. Doe v. Jones, 4 Term R. 300.

Lord Kenyon said, that supposing there existed any doubts respecting the meaning of the statute 25 Edw. 3., yet the subsequent statutes operated as a parliamentary exposition of it; particularly the stat. 4 Geo. 2. c. 21. which had closed the question, by enacting that all children born out of the ligeance of the Crown, whose *fathers* were natural-born subjects, should be natural-born subjects. And also the statute 13 Geo. 2. c. 21., which extended the same privilege to grandchildren; but still confined them to the paternal line: from which it clearly followed, that a person born in foreign parts, and of a foreign father, did not derive inheritable blood, in this kingdom, from his mother. 1 Vent. 422.

17. If an alien has two sons born in England, the one may inherit from the other, though none of them can inherit to their father: for the descent between them is immediate; and one shall make his title in a writ of *mort d'ancestor* as heir to his brother without mention of the father. Collingwood v. Pace, 1 Vent. 413. O. Bridg. 410.

1 Vent. 416, 417, & 426.

18. Formerly, where an alien was *medius antecessor*, no title could be derived through him: but still an alien does not impede the descent. Thus, if an eldest son were an alien, the law took no notice of him; and the lands would descend to the younger brother. So if a person purchased land, and died, leaving no relation on the part of his father, but an alien, it would descend to the heir on the part of the mother.

Or naturalized, or made denizens. 1 Inst. 8. a. 129. a.

19. An alien may be naturalized by act of parliament, by which he becomes as capable of inheriting real property as if he were a natural-born subject. And if an alien be made a denizen by the King's letters patent, and afterwards purchases lands, his son, born before his denization, cannot inherit those lands; but a son born after the denization may inherit them, even though his elder brother were living. For the father before denization had no inheritable blood to communicate to his eldest son: but by denization it acquired an hereditable quality, which was transmitted to his subsequent posterity. If he had been naturalized, such eldest son might then have inherited; for that cancels all defects, and is allowed to have a retrospective energy, which simple denization has not.

A title may be deduced through an alien.

20. By the statute 11 & 12 Will. 3. c. 6. it is enacted, that all persons, being natural-born subjects, may inherit and make their title by descent from any of their ancestors, lineal or collateral, although their father or mother, or their ancestor, through whom they derive their pedigree, were born out of the King's allegiance. But by a subsequent statute, 25 Geo. 2. c. 39., it is provided, that no right of inheritance shall accrue, by virtue of the former statute, to any person whatsoever, unless they are in being, and capable to take as heirs, at the death of the person last seised: with an exception to the case where lands shall descend to the daughter of an alien; which descent shall be devested in favour of an after-born brother, or the inheritance shall be divided with an after-born sister or sisters; according to the usual rule of descent.

Infra. c. 3.

Persons attainted can neither inherit nor transmit. 1 Inst. 8 a. 391 b.

21. Persons attainted of high treason, and [previously to the statute 54 Geo. 3. c. 145. of any species] of felony were incapable of inheriting lands, or of transmitting them by descent to their children. Thus Lord Coke says,—"If a man be attainted of treason or felony, he can be heir to no man, nor any man heir to him, *propter delictum*. And this disability can only be removed

by act of parliament. But a person may inherit from one of his parents, though the other was attainted of treason or felony; for *duplicatus sanguis* is not necessary in descents.

22. Thus it is stated by Jenkins to have been resolved in the Exchequer Chamber, that where an attainted person married an heiress, and had issue by her, that issue should inherit; for the marriage was lawful, and the issue claimed only from the mother. Cent 1. Ca. 2. Cent. 5. Ca. 27. Noy 165. 2 Hawk. P. C. c. 49. s. 49.

23. [But by the statute 54 Geo. 3. c. 145. it is enacted that no attainder for felony, save and except in cases of the crime of high treason, or of the crimes of petit treason, or murder, or of abetting, procuring, or counselling the same, shall extend to the disinheriting of any heir, nor to the prejudice of the right or title of any person or persons, other than the right or title of the offender or offenders during his, her, or their natural lives only; and that it shall be lawful to every person or persons to whom the right or interest of any lands, tenements, or hereditaments, after the death of any such offender or offenders, should or might have appertained, if no such attainder had been made, to enter into the same.]

24. There was [previously to the above statute] a further consequence of attainder for treason or any species of felony, which was the corruption and extinction of all hereditary blood in the person attainted; by which he was rendered not only incapable himself of inheriting or transmitting his own property by heirship; but he would also obstruct the descent of lands or tenements to his posterity, in all cases where they were obliged to derive their title through him, from any remote ancestor. Corruption of blood.

25. This doctrine is thus explained by the Hon. Charles Yorke:—"It is a principle in all states, where a man is neither a subject by birth, or express compact, or has voluntarily renounced the mutual obligations, to consider him as *not* within their obedience, or even notice: but when he has forfeited his civil rights by crime, he is regarded as still subject to their power; and in every respect within the strict consideration of the law; that the ancient common law of England clearly proceeds upon this principle. Where a man was not capable of civil rights by nature, as an alien born, and never naturalized, being unknown to the law, he was excluded from inheriting; and the next of kin within the allegiance, who did not claim under him, was ad- Law of Forfeiture, 4th ed. 72. Id. 85.

mitted: or where he had incurred civil disabilities, by his own voluntary act, not criminal; as one who entered religion, or adjured the realm, he was taken to have undergone civil death, and the next in descent entered. But where he is attainted of treason or felony, the law will not pass him over, and marks him out *in rei exemplum et infamiam.* Hence it is, that though he was never in possession, nor those who claim under him more capable of inheriting than he, by reason of the consequential disability arising from the attainder of the ancestor; yet the estate will be interrupted in its course to the collateral; and escheat."

P. C. Part I. 316.

26. Thus it is laid down by Lord Hale, that if there be grandfather, father, and son, and the father is attainted, and dies in the lifetime of the grandfather, the son cannot inherit an estate in fee simple from the grandfather; because he must necessarily derive his descent through his father, which he cannot do by reason of the attainder.

Grey's case, 3 Dyer 274. Cro. Car. 543.

27. Where there were two brothers, and the youngest had issue a son, and was attainted of high treason, and executed; it was held that this son could not inherit from his uncle; because he must of necessity derive his descent through his father.

1 Vent. 416. 426.

28. A. and B. were brothers, A. was attainted, and had issue C., and died: C. purchased lands, and died without issue. Held that B., his uncle, could not inherit from him; because he must derive his descent through A., who was the *medius antecessor*, and incapable.

Dyer 48 a.

29. If a man has two sons, and the eldest is attainted, and afterwards the father dies seised of an estate in fee simple, the younger brother cannot inherit from the father; for the elder brother, though attainted, is still a brother, and no other can be heir to the father, while he is alive.

Rot. Parl. Vol. III. 440.

This was considered as such a hardship, that in 1 Hen. 4. a petition was preferred by the Commons to the King, praying, that where the eldest son, during the life of the father, was attainted, the next brother might notwithstanding succeed, as heir to his father; to which the King answered,—"Let the common law run."

30. It was, however, a general rule, that the attainder of a

person who need not be mentioned in the derivation of the descent did not impede, let the ancestor be never so remote: therefore, where a person might claim as heir to an ancestor, without being obliged to derive his descent through an attainted person; he would not be affected by his attainder.

31. Thus, in the case of the attainder of an elder son, if such elder son dies in the lifetime of his father, without issue, the younger son will then inherit from the father; because he can derive his descent from him, without claiming through or mentioning his elder brother. Hob. 334. Cro. Car. 435. Hale, P.C. ante.

32. Lord Coke says, if a man has issue two sons, and after is attainted, and one of the sons purchases lands, and dies without issue, the other brother shall be heir: for the attainder of the father only corrupts the lineal blood, and not the collateral blood between the brothers, which was vested in them before the attainder. But some held, that if a man, after attainder, have issue two sons, the one of them cannot be heir to the other, because they could not be heir to the father; for that they never had any inheritable blood in them. It is however now settled, that the descent between brothers is immediate; therefore that the attainder of the father does not prevent his sons from inheriting from each other; for though the father is *medium differens sanguinis*, yet he is not *medium differens hæreditatis*. 1 Inst. 8 a. Hoby's case, Palm. 19. Collingwood v. Pace, 1 Vent. 413. 3 Salk. 129.

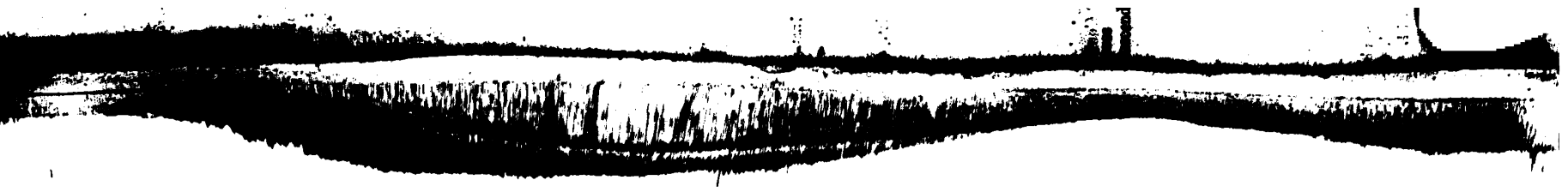
33. Sir W. Blackstone observes, that corruption of blood being looked upon as a peculiar hardship, therefore in most, if not all, the new felonies, created by parliament since the reign of Henry VIII., it is declared that they shall not extend to any corruption of blood. 2 Comm. 256.

34. By a statute passed in 7 Ann. it was enacted, that corruption of blood should cease upon the death of the two grandsons of James II. It was, however, revived by a modern statute, 39 Geo. 3. c. 93. But by the subsequent one, 54 Geo. 3. c. 145., it is confined to high treason, petit treason, and murder; and to the crime of abetting, procuring, or counselling the same. (*a*) Supra. s. 23.

35. [By the recent statute on Inheritance, 3 & 4 Will. 4.

(*a*) With respect to restitution of blood, vide Title XXVI. c. 2.

c. 106. s. 10. it is enacted, that when the person from whom the descent of any land is to be traced shall have had any relation, who having been attainted, shall have died before such descent shall have taken place, then such attainder shall not prevent any person from inheriting such land, who would have been capable of inheriting the same by tracing his descent through such relation, if he had not been attainted, unless such land shall have escheated in consequence of such attainder, before the 1st day of January 1834.]



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CHAP. III.

Rules or Canons of Descent.

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86. *Observations on Blackstone.*

SECTION I.

THE first rule or canon of descent, as laid down by Sir W. Blackstone, is, — "That inheritances shall lineally descend to the issue of the person who last died actually seised, *in infinitum:* but shall never lineally ascend." (*a*)

I. Canon. Inheritances lineally descend.

(*a*) [This canon applies now only to descents which have taken place on the death of any person who died before the 1st day of January, 1834; for by the stat. 3 & 4 Will. 4. c. 106. in all cases of descents occurring upon the death of persons dying after that day, lineal ancestors are capable of inheriting, and they come in next after the lineal descendants of the last proprietor; thus if A. dies seised intestate and without issue, leaving a father, brothers, and sisters, the father will take next as heir to his deceased son, before the brothers and sisters of the deceased. The words of section 6. of the act are, "that every lineal ancestor shall be capable of being heir to any of his issue; and in every

To explain this and the subsequent canons of descent, it will be necessary to premise some rules and principles of the common law, which are applicable to this subject.

Rule that *nemo est hæres viventis.*

2. It is a rule of the common law, that no inheritance can vest, nor can any person be the actual complete heir of another, till the ancestor is previously dead; *nemo est hæres viventis.* Before that time, the person who is next in the line of succession is called an heir apparent, or an heir presumptive. Heirs apparent are such, whose right of inheritance is indefeasible, provided they outlive their ancestor; as the eldest son, or his issue; who must, by the course of the common law, be heir to the father, whenever he happens to die. Heirs presumptive are those who, if the ancestor should die immediately, would, in the present circumstances of things, be his heirs; but whose rights of inheritance may be defeated by the contingency of some nearer heir being born.

The ancestor must die seised.

3. Another rule of the common law respecting descents is, that no person can properly be such an ancestor, as that an inheritance can be derived from him, unless he had an actual seisin.

1 Inst. 11 b.

Or, as Lord Coke expresses it,—"A man that claimeth as heir in fee simple to any man by descent, must make himself heir to him that was last seised of the actual freehold and inheritance."

Hist. c. 11.

And Lord Hale says—"The last actual seisin in any ancestor makes him, as it were, the root of the descent, equally, to many intents, as if he had been a purchaser: and therefore he that cannot, according to the rules of descents, derive his succession from him that was last actually seised, though he might have derived it from some precedent ancestor, shall not inherit." (*a*)

2 Comm. 209.

4. The law requires this notoriety of possession, says Sir W.

case where there shall be no issue of the purchaser, his nearest lineal ancestor shall be his heir in preference to any person who would have been entitled to inherit, either by tracing his descent through such lineal ancestor, or in consequence of there being no descendant of such lineal ancestor, so that the father shall be preferred to a brother or sister and a more remote lineal ancestor to any of his issue other than a nearer lineal ancestor or his issue.]

(*a*) [In cases of descents occurring upon the deaths of persons dying after the 1st day of January, 1834, this rule is abolished; for by the late statute on Descents, ss. 1. 2. actual seisin is not necessary, but the descent is to be traced to the person last entitled to the land, that is, to the person who last had a right to the land, whether he did or not obtain actual possession, or the receipt of the rents and profits thereof.]

See also 3 & 4 Will. 4. c. 27. s. 14.

Blackstone, as evidence that the ancestor had the property in himself, which is to be transmitted to his heir. The seisin, therefore, of any person makes him the root or stock from which all future inheritance, by right of blood, must be derived; which is briefly expressed in the maxim of Fleta, *seisina facit stipitem.*

5. The nature of seisin, and the difference between seisin in deed and seisin in law, has been explained in a former Title. It is therefore sufficient here to observe, that when a person acquired an estate in fee simple in land by descent, [on the death of a person dying before the 1st day of January, 1834], it was necessary that he should enter on the lands to gain a seisin in deed, in order to transmit it to his heir; for if he had a seisin in law only, it would not be sufficient. Tit. 1. Lit. s. 8. 1 Inst. 11 b. 15 a. Stat. 3 & 4 Will. 4. c. 106.

6. The rule was the same with respect to incorporeal hereditaments. So that where an advowson in gross, or a rent, so descended to a person, he must actually present to the church, and receive the rent, before he could become the stock of a descent: but if the advowson were appendant to a manor, there actual seisin of the manor would give a seisin of the advowson. Id. 15 b.

7. There were, however, several exceptions to this rule, as where an ancestor acquired an estate by his own act, he was in many cases allowed to transmit it to his heirs, though he never had actual seisin of it himself. Thus it is laid down *arguendo*, in Shelley's case, that if a fine was levied to A. in fee, and afterwards, but before execution, A. died, his heir might enter; and though he were the first that entered, yet he should be in by descent; it being a rule, that where the heir takes any thing which might have vested in the ancestor, the heir should be in by descent. It was however observed, that in a case of this kind the heir would not have been in directly by descent, either to be in ward, or to have had his age, or to have tolled the entry of one who had right. Exceptions to this rule. 1 Rep. 98 a.

8. In the case of an exchange, if both parties die before either enters, the exchange is totally void: but if one of the parties enters, and the other dies before entry, his heir may enter, and shall be in by descent. Id. 98 b. Tit. 32. c. 6.

9. Trust estates or equitable interests in lands or tenements might [even before the recent alterations in the law of descent,] be transmitted to the heir, by an ancestor who never had obtained any kind of seisin or possession whatever. Thus where a person

Potter *v.* Potter, 1 Ves. 437.

contracts for the purchase of a real estate, and dies before it is conveyed to him, his equitable interest will descend to his heir, if not disposed of by will. (*a*)

Explanation of the first canon.

10. We now return to the first canon of descent, in consequence of which, whenever a person dies seised in fee simple of a real estate, leaving issue, it immediately descends to such issue, on whom the freehold in law is cast before entry.

A descent may be defeated by the birth of a nearer heir. Tit. 1. 1 Inst. 11 b.

11. It has been stated to be a rule of law, that the freehold shall never, if possible, be in abeyance. It is therefore settled, that lands shall always descend to the person who is heir at the time of the death of the ancestor: but such descent may be defeated by the subsequent birth of a nearer heir. Thus where a person dies leaving his wife *ensient*, the common law, not considering the infant *in ventre matris* to be in existence, casts the freehold on the person who is then heir. But when the posthumous child is born, his guardian may enter upon such heir, and take the estate from him.

12. It was formerly doubted whether in a case of this kind the posthumous child was entitled to the profits from the death of his ancestor, or only from the time of his birth. But in a modern case Lord C. J. De Grey laid it down as clear law, upon the authority of a case in the Year Books, Trin. 9 Hen. 6. 25 *a.* that a posthumous child was not entitled to any profits received before his birth; because the entry of the heir was congeable, till the posthumous child was born.

Goodtitle *v.* Newman, infra.

1 Inst. 11 b.

13. If a man has issue a son and a daughter, and the son purchases lands in fee, and dies without issue; the daughter shall inherit the land from him. But if afterwards the father has issue a son, this son shall enter into the land, as heir to his brother, and oust his sister.

Bro. Ab. Tit. Descent, pl. 58.

14. So where a son purchased land, and died without issue, his uncle entered as his heir; two years after the father had issue another son; and it was held that such other son might enter on his uncle.

Exclusion of the ascending line.

15. The last clause of the first canon of descent, by which

2 P. Will. 713.

(*a*) [Equitable estates were, before the recent alterations in the law of inheritance, and still continue subject to the same rules and canons of descents as legal estates. In the case above cited the person contracting is in every sense of the word the purchaser; and equity considering what is agreed to be done as done, deems the buyer the real owner of the land from the period of the contract, when he becomes equitably seised.]

parents, and all lineal ancestors, were excluded from succeeding to the inheritance of their offspring, is derived from the feudal law, in which, we have seen, it was a settled maxim that the ascending line should in no case inherit. (*a*) This rule appears to have been fully established in England in the time of King Henry II.; for Glanville writes, *hæreditas nunquam autem naturaliter ascendit.* And it was probably derived immediately to us from the customs of Normandy.

Dissert. c. 1. s. 61.

Lib. 7. c. 1. Wright's Ten. 180.

16. "If (says Littleton, s. 3.) there be father and son, and the father hath a brother that is uncle to the son, and the son purchase land in fee simple, and die without issue, living his father; the uncle shall have the land, as heir to the son, and not the father, yet the father is nearer of blood; because it is a maxim in law, that inheritance may lineally descend, but not ascend. Yet if the son, in this case, die without issue, and his uncle enter into the land, as heir to the son, as by law he ought, and after the uncle dieth without issue living; the father shall have the land, as heir to the uncle, and not as heir to the son."

3 Rep. 40 a. 12 Mod. 623.

17. Lord Coke has observed on this passage, that if the uncle does not enter, the father cannot inherit from him; because he must make himself heir to the person last seised, which the uncle was not; for the person last seised was the son, to whom the father cannot make himself heir.

1 Inst. 11 b.

18. A father or mother may however be cousin to their own child; and in that relation may inherit from him, notwithstanding the relation of father or mother.

19. A son died seised of lands in fee, without issue, or brother or sister, but leaving two cousins his heirs at law, one of whom was his own mother. And the question was, whether the mother could take as heir to her son. It was determined by Sir J. Jekyll, M. R. that though a father or mother could not, as father or mother, inherit immediately after their son; yet if the case should so happen, that the father or mother were cousin to the son, and as such his heir, they might take notwithstanding; and that here, though the heir was also mother, this did not hinder her from taking in the capacity or relation of cousin.

Eastwood *v.* Vinke, 2 P. Wms. 614.

20. The second canon or rule of descent is—"That the male

II. Canon. Males preferred to females.

(*a*) [See the note on sect. 1. of this chapter.]

issue shall be admitted before the female." Thus sons are admitted before daughters; or, as Lord Hale expresses it—"In descents the law prefers the worthiest of blood; therefore, the son inherits and excludes the daughter. The brother is preferred before the sister, the uncle before the aunt." But daughters succeed before collateral relations; and in all cases of descent, females are preferred to more remote males; our law steering a middle course between the absolute rejection of females, and the putting them on a footing with males. (*a*)

Hist. c. 11.

2 Comm. 214.

III. Canon. The eldest male succeeds.

21. The third canon or rule of descent is—"That where there are two or more males, in equal degree, the eldest only shall inherit, but the females all together."

The doctrine of primogeniture is also of feudal origin; for though upon the first introduction of hereditary feuds, they descended to all the sons, yet that course was changed by a constitution of the Emperor Frederic. This practice appears to have been first introduced into England by the Conqueror: but was only applied to honorary and military feuds, which could not be divided without great inconvenience.

Wright's Ten. 31.

Lib. 7. c. 3.

22. Thus we learn from Glanville, that in the reign of Henry II. estates held by military service descended to the eldest son only; and estates held in socage were partible among all the sons. *Cum quis ergo hæreditatem habens, moriatur, si unicum filium hæredem habuerit indistinctè verum est quod filius ille patri suo succedit in totum. Si plures reliquerit filios, tunc distinguitur utrum ille fuerit miles, sive per feudum militare tenens, aut liber sokemannus; quia si miles fuerit, vel per militiam tenens, tunc secundum jus regni Angliæ, primogenitus filius patri succedit, in totum. Ita quod nullus fratrum suorum partem inde de jure petere potest. Si vero fuerit liber sokemannus, tunc quidem dividetur hæreditas inter omnes filios, quotquot sunt, per partes equales.*

(*a*) [This second canon of descents is further confirmed and explained by the statutes 3 & 4 Will. 4. c. 106. s. 7. The following are the words of the act:—"That none of the maternal ancestors of the person from whom the descent is to be traced, nor any of their descendants, shall be capable of inheriting until all his paternal ancestors and their descendants shall have failed; and also that no female paternal ancestor of such person, nor any of her descendants, shall be capable of inheriting until all his male paternal ancestors and their descendants shall have failed; and that no female maternal ancestor of such person, nor any of her descendants, shall be capable of inheriting until all his male maternal ancestors and their descendants shall have failed."]

23. The right of primogeniture appears, however, to have been fully established in the reign of Henry III. in socage lands, as well as in those held by a military service. For Bracton, in stating the law of descents, says—*Si quis plures habet filios, jus proprietatis semper descendit ad primogenitum, eo quod ipse inventus est primo in rerum naturâ.* 64. b.

24. As to females, all being equally incapable of performing any military service, there could be no reason for preferring the eldest; and therefore Littleton states the law to be, that where a man or woman seised of lands in fee, hath issue but daughters, they shall all equally inherit, and make but one heir; and are called parceners by descent. But females equally. s. 241. Tit. 19.

25. By the feudal law impartible inheritances descended to the eldest daughter; in imitation of which we find that formerly offices of honour descended to the eldest daughter. Thus it is stated in the printed case of Lady Willoughby, of Eresby, claiming the office of great chamberlain, that the office of steward of England had descended, in two instances, to the eldest daughter; the office of constable of England had come to Humphrey De Bohun, by his marriage with the eldest daughter of Milo Fitzwalter; and the office of Earl Marshal of England had come to Roger Bigot, Earl of Norfolk, in right of his mother Maud, eldest daughter of William Marshall, Earl of Pembroke. But in the late case of the great chamberlain, the House of Lords, after having consulted the Judges, certified to the King that upon the death of the Duke of Ancaster, who died seised of the office of great chamberlain, the same descended to Lady Willoughby, of Eresby, and Lady Charlotte Bertie, his sisters and coheiresses; and belonged to both, and not to the eldest only. The Crown acquiesced. 2 Bro. Ca. in Parl. 146. Dyer, 285. b.

26. The fourth canon or rule of descent is—"That the lineal descendants *in infinitum* of any person deceased shall represent their ancestor; that is, shall stand in the same place as the person himself would have done, had he been living." Hence it is (says Lord Hale) that the son or grandchild, whether son or daughter, of the eldest son, succeeds before the younger son; and the son or grandchild of the eldest brother before the youngest brother. And so through all the degrees of succession, by the right of representation, the right of proximity is transferred from IV. Canon. Right of representation. Hist. c. 11.

the root to the branches, and gives them the same preference as the next and worthiest of blood.

Hist. c. 11.

27. "This right (continues Lord Hale) transferred by representation, is infinite and unlimited, in the degree of those that descend from the represented. For the son, the grandson, and the great-grandson, and so *in infinitum*, enjoy the same privilege of representation as those from whom they derive their pedigree had, whether it be in descents lineal or transversal; therefore, the great-grandchild of the eldest brother, whether it be a son or a daughter, shall be preferred before the younger brother, because though the female be less worthy than the male, yet she stands in right of representation of the eldest brother, who was more worthy than the younger."

Idem.

28. "So, if a man have two daughters, and the eldest dies in the life of the father, leaving six daughters, and then the father dies, the youngest daughter shall have an equal share with the other six daughters, because they stand in representation and stead of their mother, who could have but a moiety."

1 Inst. 10. b.

29. It follows from this rule that the nearest relation is not always the heir at law, as the next cousin *jure representationis* is preferred to the next cousin *jure propinquitatis*. And the taking by representation is called succession *per stirpes*, according to the roots, since each branch inherits the same share that their root or *stirps*, whom they represent, would have taken.

V. Canon. Collateral descents. See also Hawkins v. Shewen, 1 Sim. & Stu. 257.

30. The fifth canon or rule of descents is—"That on failure of lineal descendants, or issue of the person last seised, the inheritance shall descend to his collateral relations, being of the blood of the first purchaser, subject to the three preceding rules." And Sir W. Blackstone says, "the great and general principle upon which the law of collateral inheritances depends, is, that upon failure of issue in the last proprietor, the estate shall descend to the blood of the first purchaser; or that it shall result back to the heirs of the body of that ancestor from whom it either really has, or, is supposed by fiction of law to have originally descended; according to the rule laid down in the Year Books, Fitzherbert, Brook, and Hale—'That he who would have been heir to the father of the deceased, and of course to the mother, or any other real or supposed purchasing ancestor, shall also be

heir to the son,' A maxim that will hold universally; except in the case of a brother or sister of the half blood."

31. [The above canon relating to collateral descent is now altered (except in descents which have occurred on deaths before the 1st day of January, 1834.) For by stat. 3 & 4 Will. 4. c. 106. s. 6. the lineal ancestor is preferred to the collaterals claiming through him. The words of the sixth section of the above act are given in a former page.] s. 1. note.

32. It was a maxim of the old law that no person could inherit an estate unless he was descended from the first purchaser or acquirer of it. This rule is to be found in the *Grand Coustumier*, of Normandy, c. 25. from whence it was introduced here; and is plainly derived from the feudal law. For when feuds first became hereditary, no person could succeed to a *feudum novum*, but the lineal descendants of the first acquirer, who was called the *perquisitor*. So that if a person died seised of a feud of his own acquiring, without leaving issue, it did not go to his brothers, but reverted to the donor. If it was *feudum antiquum*, that is, if it had descended to the proprietor from any of his ancestors; then his brothers, and such other collateral relations as were descended from the person who first acquired it, might succeed. The heir must be of the blood of the first purchaser.

33. When the feudal rigour was in part abated, a method was invented to let in the collateral relations of the first purchaser to the inheritance, by granting a *feudum novum*, to hold *ut feudum antiquum*; that is, with all the qualities annexed to a feud derived from his ancestors; and then the collateral relations were admitted to succeed, even *in infinitum*; because they might have been of the blood of the first imaginary purchaser. 2 Comm. 221.

34. In imitation of this rule, it has long been established in England, that every acquisition of an estate in fee simple by purchase shall be considered as a *feudum antiquum*, or feud of indefinite antiquity: therefore the collateral kindred of the grantee, or descendants from any of his lineal ancestors, by whom the lands might possibly have been purchased, are capable of being called to the inheritance. Idem. 222.

35. But where an estate has really descended, in a course of inheritance, to the person last seised, the strict rule of the feudal

law is still observed; and none are admitted but the heirs of those through whom the inheritance has passed; for all others have demonstrably none of the blood of the first purchaser (*a*) in them.

Hist. c. 11. 120.

36. Thus Lord Hale says, if the son purchases land, and dies without issue, it shall descend to the heirs on the part of the father; and if he leaves none, then to the heirs on the part of the mother; because though the son has both the blood of the father and the mother in him, yet he is of the whole blood of the mother; and the consanguinity of the mother are *consanguinei cognati* of the son. On the other side, if the father had purchased land, and it had descended to the son, and the son had died without issue, and without any heir on the part of the father; it should never have descended in the line of the mother, but escheated. For though the *consanguinei* of the mother were the *consanguinei* of the son, yet they were not of consanguinity to the father, who was the purchaser. But if there had been none of the blood of the grandfather, yet it might have resorted to the line of the grandmother; because her *consanguinei* were as

3 & 4 Will. 4. c. 106.

(*a*) [The import of the word purchaser has been much extended by the enactments of the recent statute for amending the law of inheritance. In s. 1. it is declared, that the word purchaser in the act shall mean the person who last acquired the land otherwise than by descent, or than by an escheat, partition, or inclosure, by the effect of which the land shall have become part of or descendible in the same manner as other land acquired by descent. By s. 2. it is enacted, that in every case descent shall be traced from the purchaser; and to the intent that the pedigree may never be carried further back than the circumstances of the case, and the nature of the title shall require,

s. 1.

the person last entitled to the land (that is, the person who had a right thereto, whether he did or did not obtain the possession or the receipt of the rents and profits thereof) shall, for the purposes of this act, be considered to have been the purchaser thereof, unless it shall be proved that he inherited the same, in which case the person from whom he inherited the same shall be considered to have been the purchaser, unless it shall be proved that he inherited the same; and, in like manner, the last person from whom the land shall be proved to have been inherited, shall in every case be considered to have been the purchaser, unless it shall be proved that he inherited the same.

And by s. 3. it is enacted, that when any land shall have been devised by any testator who shall die after the 31st day of December, 1833, to the heir, or to the person who shall be the heir of such testator, such heir shall be considered to have acquired the land as a devisee, and not by descent; and when any land shall have been limited, by any assurance executed after the said 31st day of December, 1833, to the person, or to the heirs of the person who shall thereby have conveyed the same land, such person shall be considered to have acquired the same as a purchaser, by virtue of such assurance, and shall not be considered to be entitled thereto, as his former estate, or part thereof. And see sect. 4.]

well of the blood of the father, as the mother's consanguinity is of the blood of the son; consequently, also, if the grandfather had purchased lands, and they had descended to the father, and from him to the son, if the son had entered, and died without issue, his fathers, brothers, or sisters, or their descendants; or for want of them, his grandfather's brothers or sisters, or their descendants; or for want of them, his great-grandfather's brothers or sisters, or their descendants; or for want of them, any of the consanguinity of the great-grandfather, or brothers or sisters of the great-grandmother, or their descendants, might have inherited; for the consanguinity of the great-grandmother was the consanguinity of the father: but none of the line of the mother or grandmother, viz. the grandfather's wife, should have inherited; for that they were not of the blood of the first purchaser. And the same rule, *e converso*, holds in purchases in the line of the mother or grandmother; they shall always keep in the same line that the first purchaser settled them in.

Descents *ex parte paternâ et maternâ.*

37. [From the above rule it follows] that where lands descend to a person on the part of the father, none of his relations on the part of the mother can inherit them. And *vice versâ*, where lands descend to a person from his mother, no relation on the part of his father can take them by descent. It should, however, be observed that inheritances of this kind cannot be created by any act of the parties; for if a person gives lands to another, to hold to him and his heirs, on the part of his mother, yet his heirs on the part of his father, shall inherit. For no person can create a new kind of inheritance, not allowed by the law; therefore, the words "on the part of mother" are void.

1 Inst. 12 a. 13 a. — Doug. R. 773. Goodtitle *v.* White, 2 N. R. 383. 15 East. 174.

What acts will alter the descent.

38. Where a person was seised in fee simple by descent, *ex parte maternâ*, there were [even before the late statute] many acts which might be done by such a person that would operate so as to make him a new purchaser of the estate, by which means it would become a feud of indefinite antiquity; and descendible to his heirs general, whether of the paternal or maternal line.

1 Inst. 12 b.

39. Thus Lord Coke says, if a person be seised of lands, as heir of the part of his mother, and makes a feoffment in fee, and takes back an estate to him and to his heirs, this is a new purchase; and if he dies without issue, the heirs of the part of the father shall inherit.

Mr. Hargrave has observed on this passage, that Lord Coke

must be understood to speak of two distinct conveyances in fee. The first passing the use, as well as the possession, to the feoffee, and so completely devesting the feoffor of all interest in the land; and the second regranting the estate to him.

Idem. 40. So if a person seised of lands *ex parte materná*, make a feoffment in fee of them, reserving a rent to himself and his heirs, this rent will go to his heirs *ex parte paternâ*: because the feoffment in fee was a total disposition of the estate; and the rent was acquired by purchase.

3 & 4 Will. 4. c. 106. s. 3. sup. p. 336 note. 41. [But now by the before-mentioned statute, if lands are limited by any assurance executed after the 31st day of Dec. 1833, to the person, or to the heirs of the person, who shall thereby convey the lands, such persons shall be considered to have acquired the lands as a purchaser by such assurance.]

Tit. 28. c. 8. 42. Where an estate descended *ex parte materná* is devised to an heir at law, in such manner as to make him a purchaser of it, the descent will be to the heirs *ex parte paternâ*. (*a*)

43. The renewal of a lease for lives being considered as a new acquisition, the person renewing becomes a purchaser, and the descent is thereby altered.

Mason v. Day, Prec. in Cha. 319. 44. Elizabeth Mason having purchased a lease for three lives, died, leaving Mary, her daughter and heir, an infant. Two of the lives being dead, the guardians of the infant, out of the profits of the estate, took a new lease to the infant and her heirs, for three new lives; and afterwards the infant died without issue.

The question was, whether this lease should descend to the heirs of the infant *ex parte paternâ* or *maternâ*. It was contended that it should go to the heirs *ex parte maternâ*, being a renewal only of the old lease, and under the old trust. For if the infant heir had died without issue before the renewal, living the surviving *cestui que vie*, there had been no question of it; and so ought the new lease, being renewed out of the profits of the old lease.

The Master of the Rolls held that the renewed lease was a new acquisition, which vested in the daughter as a purchaser; therefore it should first go to the heirs of the part of the father.

(*a*) [Any devise to the heir of the testator, dying after the 31st day of December, 1833, will make the devisee a purchaser under the stat. 3 & 4 Will. 4. c. 106. s. 3. Vide supra, p. 336 note.]

The Lord Keeper Harcourt coming into Court, said he was of the same opinion.

45. In a subsequent case, exactly similar, it was objected that the renewal was an act done by a guardian only, during the minority; and ought not to prejudice any who take by representation; it being merely voluntary, and not of necessity. But Lord Hardwicke answered, that if this had been wantonly done by the guardian, without any real benefit to the infant, it would have been proper to have come into a court of equity to be relieved against it. But here was a just and reasonable occasion for what the guardian had done; here one life being dead, surrendering the old and taking a new lease was the most beneficial purchase for the infant that could be; and therefore ought to have the same consequence as if done by the infant herself, at her full age; and go to her heirs *ex parte paternâ*. That the case of Mason *v.* Day was exactly in point. Pierson *v.* Shore, 1 Atk. 480.

46. [An equitable] estate being descendible in the same manner as a legal one, where the equitable estate descends from the mother it will go to the heirs *ex parte maternâ;* but where the legal estate descends *ex parte maternâ*, and the trust estate *ex parte paternâ*, or *vice versâ*, the trust estate will merge in the legal, and both will follow the line through which the legal estate descended. Tit. 12. c. 2. s. 8.

47. Serjeant Selby agreed for the purchase of the estate in question, and paid for it, but died before any conveyance was made; having by his will devised all his real and personal estate to his wife, in trust to educate and maintain his son, until he should attain the age of twenty-one years; and afterwards in trust to convey all the rest of his real estate to his son and his heirs. After the testator's death, the estate was conveyed to Mrs. Selby, who died before the son attained twenty-one: but he afterwards attained that age, and died in possession of the estate. The lessor of the plaintiff was his heir at law on the part of his mother, and the defendants were his heirs at law on the part of his father's mother. Goodright *v.* Wells, 2 Doug 771. Langley *v.* Sneyd, 1 Sim. & Stu. 45.

Lord Mansfield said, — "Serjeant Selby after his purchase was owner of the equitable estate, and had a right to go into Chancery to compel a conveyance. After his death the vendor conveyed to the widow, which conveyance was absolutely in trust for the son. He outlived his mother, by whose death the

trust estate was completely vested in him, and the legal estate descended to him from her. The question was, to whom the estate descended on the death of the son. If it descended from the mother, the lessor of the plaintiff took it as heir at law: but it was contended, that though he was heir, there was a trust for the paternal heirs; and it was said to be settled, that the Court would not suffer a trustee to recover in ejectment against a *cestui que trust*. A case so circumstanced as this in every particular probably never existed before, and perhaps never might again: but cases must often have happened in which the general question would arise, *viz.* whether when *cestui que trust* takes in the legal estate, possesses under it, and dies, the legal and equitable estates should open on his death, and be severed for the different heirs. Consider, first, upon authority; and, secondly, upon principle. First, no case had ever existed where it had been so held; none where the heir at law of one denomination had, on the death of the ancestor, been considered as a trustee for the heir at law of another denomination, who would have taken the equitable estate if that and the legal estate had not united. Secondly, on principle, it seemed to him impossible; for the moment both met in the same person, there was an end to the trust: he had the legal interest and all the profits by his best title. A man could not be trustee for himself. Why should the estates open upon his death? What equity had one set of heirs, more than the other? He might dispose of the whole if he pleased: if he did not, there was no room for Chancery to interpose; and the rule of law must prevail. *Quâcunque viâ datâ*, therefore, the lessor was entitled. If the question was doubtful, then in the Court of King's Bench the legal right must prevail: if the weight of opinion and argument was, that the legal estate must draw the trust after it; the case was still stronger against the defendant."

Judgment for the plaintiff.

What acts will not have that effect.

48. No conveyance, however, of a particular estate will alter the mode of descent of the reversion; because it is not a total departure of the estate. Therefore if a person seised *ex parte maternâ* makes a gift in tail, or lease for life, reserving rent, the heir on the part of the mother will have the reversion, and also the rent as incident thereto.

49. Where a person seised *ex parte maternâ* [previously to the 31st day of December 1833,] made a feoffment in fee, and the use was expressly limited to the feoffor and his heirs, or if there was no declaration of uses, and the feoffment was not on such a consideration as to raise a use in the feoffee, so that the use resulted to the feoffor; in either case he was in of the ancient use, and not by purchase; therefore, the descent was not altered. 1 Inst. 12 b. 1 Rep. 100 b. Stat. 3 & 4 Will. 4. c. 106. s. 3. Tit. 11. c. 4.

50. A person seised of lands by descent *ex parte maternâ*, made a feoffment of them to uses; as to Black Acre, to the use of himself for life, remainder to his wife for life, remainder to the heirs of his body on his wife begotten, remainder to his own right heirs; and as to White Acre, to the use of himself for ninety-nine years, if he should so long live, remainder to his wife for life, remainder to his first and other sons in tail male, remainder to himself and his heirs. Adjudged, that upon the death of the husband without issue, the remainder descended to the heirs of the feoffor, *ex parte maternâ;* because the ancient fee remained in him. Godbold v. Freestone, 3 Lev. 406.

51. Where a fine was levied, or a common recovery suffered; if the use was not altered, the mode of descent was not changed: but there were some particular cases in which a fine, and also a recovery did alter the descent. Tit. 35 & 36.

52. [But now by the above mentioned act the law is altered, and if a person seised *ex parte maternâ* makes a feoffment or any other conveyance, and the use is limited to himself and his heirs, he will take by purchase, and the descent will be changed. But where, as in the case before supposed the use results, it is conceived that the statute does not affect it, but it results as the ancient use.] Sup. s. 41. s. 49.

53. The sixth canon or rule of descent is,—"That the collateral heir of the person last seised must be his next collateral kinsman, of the whole blood." VI. Canon. Proximity.

First (says Sir W. Blackstone) he must be his next collateral kinsman, either personally or *jure representationis;* which proximity is reckoned according to the canonical degrees of consanguinity. The issue or descendants, therefore, of the brother of John Stiles, (the *propositus* in the table of descents annexed) are all of them in the first degree of kindred, with respect to 2 Comm. 224. Ante, c. 2.

inheritances; those of his uncle in the second, and those of his great uncle in the third; and so on as their respective ancestors, if living, would have been; and are severally called to the succession in right of such their representative propinquity. And here it must be observed, that the lineal ancestors, though, according to the first rule, incapable themselves of succeeding to the estate, because it is supposed to have already passed them, are yet the common stocks from which the next successor must spring.

Exclusion of the half blood.

54. Secondly, the heir need not be the nearest kinsman absolutely, but only *sub modo;* that is, he must be the nearest kinsman of the whole blood: for if there is a much nearer kinsman of the half blood, a distant kinsman of the whole blood shall be admitted, and the other entirely excluded.

Grand Coust. c. 25.

55. By the ancient customs of Normandy, the *frater uterinus* could not inherit from his brother, when the inheritance descended from the father; and *vice versâ:* from which the origin of the custom of excluding the half blood probably arose.

fo. 66 a.

For Bracton states it as doubtful whether the half blood, on the father's side, was excluded from an inheritance which originally descended from the common father; or only from such as descended from the respective mothers; and from newly purchased lands. It appears however from Britton, c. 119., that when he wrote, the half-blood was excluded from inheriting in all cases.

Mayn. 148.

In 5 Edw. 2. a case arose, in which it was determined, that where a person died seised of lands, leaving a sister of the half blood, and an uncle of the whole blood, the uncle should

10 Assise, pl. 27. Bro. Ab. Tit. Descent, 20.

inherit, and not the sister. And in 10 Edw. 3. it was held, that where a man had three daughters by one venter, and one daughter by another venter, and died seised of lands, and all of them entered; afterwards two of the daughters by the first venter died, that the third daughter of the first venter should be heir to them, and should have their two parts; and the fourth daughter should take nothing from them; because she was of the half blood.

56. In conformity to these cases, it is laid down by Littleton, s. 6 and 7, that if a man has two sons by divers venters, and the elder purchases land in fee simple, and dies without issue, the younger brother shall not have the land, but the uncle of

the elder brother, or some other his next cousin shall have the same; because the younger brother is but of the half blood. So, if a man has a son and a daughter by one venter, and a son by another venter, and the son by the first venter dies without issue, his sister shall be his heir.

57. [The preceding canon of descent is now only applicable to descents occurring upon deaths previous to the 1st day of January 1834: for by the stat. 3 & 4 Will. 4. c. 106. s. 9. it is provided that any person related to the person from whom the descent is to be traced by the half blood, shall be capable of being his heir; and the place in which any such relation by the half blood shall stand in the order of inheritance, so as to be entitled to inherit, shall be next after any relation in the same degree of the whole blood and his issue where the common ancestor shall be a male, and next after the common ancestor where such common ancestor shall be a female, so that the brother of the half blood on the part of the father, shall inherit next after the sisters of the whole blood, on the part of the father and their issue, and the brother of the half blood on the part of the mother, shall inherit next after the mother.

The reason for the variation of the above enactment in the descent of the half blood on the maternal side is, that in tracing the descent to a brother of the half blood on the part of the father, the brothers and sisters of the whole blood have been previously let in to the inheritance.

Thus in the annexed Table of Descents II. upon the death of John Stiles, without issue, the descent is traced to his father Geoffrey (4), then to his brothers Francis (5) and Oliver (6), and to his sisters Bridget and Alice (7), of the whole blood; all of whom dying without issue, then to John Stiles's brother (8) and sisters (9, 10) of the half blood on his father's side, and who, as the Act declares, come in next after the relations of the same degree of the whole blood; then assuming the heirs of John Stiles, in the maternal line to fail, the mother Lucy Baker (37), is next let in, and after her the brother Lewis Gay (38), and the sisters Lucy and Ellen (39) of the half blood on the maternal side, who necessarily come in next after Lucy Baker, the mother; the brothers and sisters of John Stiles, of the whole and of the half blood on the paternal side, having been already passed in the descent.]

What seisin necessary to exclude. Ante, s. 3.

58. We have seen that [previously to the above statute] no person could be such an ancestor as that an inheritance might be derived from him, unless he had actual seisin: therefore there must have been an actual seisin in deed to exclude the

s. 8. half blood. Thus Littleton says,—"When a man is seised of lands in fee simple, and hath issue a son and a daughter by one venter, and a son by another venter, and dies, and the eldest son enters, and dies without issue; the daughter shall have the land, and not the younger son, yet the younger son is heir to the father, but not to the brother: but if the elder brother doth not enter into the land after the death of his father, but dies before any entry made by him, then the younger brother may enter, and shall have the land as heir to his father: but when the elder son, in the case aforesaid, enters after the death of his father, and hath possession, there the sister shall have the land; because it is a maxim of law, that *possessio fratris, de feodo simplici, facit sororem esse hæredem.*"

Ratcliff's case, 3 Rep. 37.

59. In consequence of this principle, it was necessary to ascertain whether the heir acquired such a seisin, upon the death of his ancestor, as was required by law, to make him the stock of the inheritance: for if he had not, then the ancestor was the person who was last seised of the inheritance, to whom the claimants must make themselves heirs.

Tit. 1.

60. It has been stated that an entry or claim [was before the late statute on inheritance], in most cases, necessary, to acquire a seisin in deed; and that where the lands lay in different counties, there must be an entry in each county. Thus where the

1 Leon. 265. demesnes of a manor extended into two counties, the eldest son, upon the death of his father, entered into the demesnes in one county only, and died without issue. It was said by Manwood, that his sister of the whole blood should inherit the demesnes whereon her brother had entered; and his brother of the half blood the rest.

Tit. 1.
1 Inst. 15 a.
3 Rep. 41 b.

61. It has also been stated that the possession of a termor for years is the possession of the person entitled to the freehold. Hence Lord Coke says, if a father makes a lease for years and the lessee enters, and the eldest son, having succeeded his father, dies during the term, before entry or receipt of rent, the younger son of the half blood shall not inherit, but the sister; because the

possession of the lessee for years is the possession of the elder son; so as he is actually seised of the fee simple; and consequently the sister of the whole blood is to be heir.

62. A. seised in fee had two daughters by several venters, and devised a moiety of the land to his wife for seven years; and that the elder sister should enter on the other moiety, on the day of her marriage. A. died; his wife entered and educated the daughters: the eldest sister married, and entered with her husband into one moiety; the younger sister died without issue. Resolved, that the heir of the whole blood of the younger sister should have her moiety; for the possession of the mother for seven years was an actual possession in the younger sister. Jenk. Cent. 6. Ca. 25.

63. It has also been stated, that the possession and seisin of one tenant in common [was, until the recent stat. 3 and 4 Will. 4. c. 27. s. 12.] the possession and seisin of the other; and it was determined, that such a possession would exclude the half blood. Tit. 20.

64. A. had issue B. a son, and M. a daughter, by one venter, and N. and O. daughters by another venter, and devised all his lands to his wife *durante viduitate*. The wife entered into all. B. the eldest son died, without having entered. It was adjudged that the will was void for a third part, because the lands were held by knight service; that the entry of the wife into all made her seised but of two parts, and tenant in common with her son of a third part; and that the entry of the wife should vest such a possession in common, in the son, of the third part, as should make a *possessio fratris* in him, for his sister of the whole blood. Small *v.* Dale, Moo. 868. Hob. 120.

65. The possession of a guardian in socage is the possession of the ward, who thereby acquires an actual seisin, without entry; and where a posthumous son was born, his mother being in possession of the lands whereof his father died seised, she became his guardian in socage; and the infant son was thereby deemed to be actually seised of the inheritance; so as to exclude the half blood. 1 Inst. 15 a. Whitcombe *v.* Whitcombe, Prec. in Cha. 280.

66. A. Newman being seised in fee of four messuages, and having issue four daughters, died, leaving his second wife *ensient* with a son, who was born six weeks after the death of his father, and lived five weeks, and then died; his mother continuing all that time in possession of the houses, residing in one of them with the two daughters, and receiving rent for the others. Goodtitle *v.* Newman, 3 Wils. 516.

The question was, whether this was such a seisin as would exclude the daughters from inheriting. It was argued for the plaintiff, the heir at law of the son of the whole blood, that the son died last actually seised in fee of the premises; that, upon the death of the father, the premises descended to his two daughters, who, together with the mother, being *ensient* with a son, were then in rightful possession; that upon the birth of the son, six weeks after, the estate of the daughters was devested out of them, and the mother then became and was guardian in socage to her son; that her possession, and receiving the rents and profits, was the actual possession and seisin of the son, and would carry the descent of the premises to the heir at law of the son. The infant son was in possession as much as it was possible for an infant to be; for he was born, lived, and died in one of the houses; which gave a title to the heir of the whole blood: for the law would presume that the mother entered rightfully, as guardian to her infant son, and not wrongfully.

On the other side, it was contended for the defendants, that the rule of *possessio fratris* was extremely severe, and ought not to be extended, but should be construed as favourably as possible for the daughters; that to make a *possessio fratris*, there ought to be an actual seisin; that it was not found or stated in the case, that the mother entered as guardian in socage, but that she and the two daughters continued in possession from the time of the husband's death; that six weeks after the husband's death the son was born, and died in the same house; that this was a continuance of the old estate in herself and the daughters, or in the daughters only; for the law would adjudge the possession in those who had a lawful right to the possession, namely, the daughters; and the Court could not determine, upon the facts stated in the case, whether the mother was in possession as guardian to the son, or as a trespasser, or for her quarantine, in order to have dower.

Lord Ch. Just. De Grey having stated the case, delivered the unanimous opinion of the Court:—" This is an ejectment brought by the heir of a posthumous son, to recover the premises in question, which were purchased by his father, who died seised thereof in fee simple, the 4th of June, 1760, leaving two daughters by his first wife, and his second wife *ensient* with this posthumous son. The wife and daughters remained in the same house where

the father died: then the wife received some rent for the houses; and afterwards, in July 1760, the son was born, and in his life-time the widow received more rent: then the son died, having lived five weeks and three days, and she received some more rent after his death. Lands in fee simple must descend to the heir of the whole blood of the person last actually seised thereof. And this is a maxim in the law of England, which has subsisted for ages, as appears by Bracton, l. 2. fo. 65.; Britton, cap. 119. fo. 271.; Fleta, l. 6. cap. l. s. 14. Although this may sometimes be very hard upon some children of the half blood of the person last actually seised, yet we must take the law as it is, and determine accordingly. The question, therefore, is, whether this posthumous son was actually seised of the premises in question.

" Upon the death of the father, his two daughters would have been good tenants to the *præcipe* before the birth of the posthumous son, who could not lay his title before he was born: the law vested the seisin in law in the daughters upon the death of the father, and in like manner vested the seisin in law in the son the moment he was born. If the daughters had aliened, or been disseised, the son would not have been actually seised, but would only have had a right of entry upon the possession of the alienee or disseisor. This was the ground of my brother Hill's argument; namely, that the daughters were disseised by the mother, and that the son died having only a right of entry, so was never actually seised. But the daughters were in actual possession as well as the mother, (of one house,) from the time of the death of their father until the birth of the son; and were also in actual possession of the other three houses, by the possession of the tenants thereof, whether any rent had been due, received, or not received, before the birth of the son. 3 Rep. 41, 42. Moor 125. Co. Lit. 14, 15. And the rent, which was due and received before the birth of the son, belonged to the daughters, who were actually seised; for, by Babington, (Ch. Just. C. B.) Trin. 9 Hen. 6. 25 *a.*, if a man has issue a daughter, and dies, his wife being *ensient*, the daughter may lawfully enter; and if she dies, her heir may enter, and take the profits for the time; and afterwards, if the wife, being *ensient* by the ancestor paramount, is delivered of a son, the son may enter, notwithstanding that the heir of his sister is in by descent: but he shall not have an ac-

tion of account, or any remedy for the issues in the mean time before his birth; because their entry was congeable until he was born. And if a church becomes void, and the sister or heir present, and their presentee be instituted and inducted before his birth, he shall not have the advantage of the avoidance; and yet by such presentation he shall not be out of possession. At the time of the birth of the son, (in the present case,) his mother was in possession, as well as the daughters. The moment he was born, she became guardian in socage; and, upon supposition that nothing was done to hinder it, the law will presume that she entered as guardian to her son the moment he was born; and nothing appears to the contrary, upon the facts stated in the case. She was in, without any declaration how she was in; and acts, without any words, amount in law to an entry; for acts without words may make an entry, but words without an act, (viz. entry into the lands, &c.) cannot make an entry.

1 Inst. 245. b.

"It was objected, that the mother being in one house, and receiving the rents of others, was a disseisor, or that it was in the daughters to make it disseisin, Cro. Car. 303.; and that if one enters as guardian who is not so, he is a disseisor, 1 Roll. Ab. 662. (J.) pl. 3. in answer to this. The facts in this case are, that the mother continued in possession from the death of her husband, received the rents under leases; her possession was general; it does not appear that she ousted the daughters, or made any actual or particular claim; she might continue in the house by quarantine, which continued until the son was born; and the entry of one is the entry of others, who have a right to enter. 1 Roll. Ab. 740, 741. If guardian by nurture make a lease by indenture to one, being under the title of the infant, rendering rent to himself, which is paid accordingly, yet this is not any disseisin to the infant. 1 Roll. Ab. 659. pl. 13.

"It is to be observed, that the title of the daughters expired on the birth of the son, before any election, to make the mother a disseisor, was made; that the law will not presume a wrong; there never was any determination, that the mother's entry or possession was by wrong, in a case like this; and it is impossible to suppose, in this case, that the whole rents and profits of the premises in question were not applied by the mother to the common use of her daughters, herself, and the infant son. Indeed, if the mother had entered as guardian to the daughters, she not

being their guardian, it would have been a disseisin; so, if she had entered for her dower, when it was not assigned to her. The possession of the mother and daughters was the possession of the daughters; and, when the son was born, the estate was devested out of the daughters, and not before; then the son was in actual possession and seisin of the premises by his mother, who had a right to the possession, as being his guardian by law, (namely) the person next of blood, to whom the inheritance cannot descend; her possession was the possession of the son. 3 Rep. 42. Moore 125. A guardian need not be assigned. The seisin of a guardian of a son by the second venter shall oust the daughters of the first venter. 8 Assise, 6.

" Upon the whole, we are all of opinion, that the premises in question belong to the lessor of the plaintiff, and therefore we give judgment for the plaintiff."

67. An entry by a mother, as guardian in socage, gave a sufficient seisin to an infant, to exclude the heir of the half blood.

68. A man died leaving two daughters by different venters; the mother entered as guardian in socage, and received the profits. The question was, whether this gave such a seisin to the daughters, that on the death of one of them, the other could not inherit from her. It was contended,—1. That the entry of the mother as guardian in socage, and her receipt of the profits, amounted to a sufficient seisin for her daughter; that this point was sufficiently established by the preceding case. 2. That the seisin of one coparcener was the seisin of the other, and the entry of one was in law the entry of the other. Where two claim by the same title, as two sons from their father, and the younger son enters, the law will presume that his entry was not to gain a possession distinct from his elder brother, but merely to preserve the estate from a stranger; therefore, though the younger son die seised, and his heir enters by descent, yet the entry of the elder brother, or his heir, is not therefore taken away. That if the law put so favourable a construction in that case, where the younger son cannot have any claim for himself, *a fortiori* such a presumption should be made in the case of coparceners, who make but one heir; and so it was stated in 1 Inst. 243 *b.* that where one coparcener enters generally, and takes the profits, this shall be accounted in law the entry of both, and no devesting of the moiety of her sister.

Doe v. Keen, 7 Term R. 386.

Tit. 19. Lit. s. 396.

On the other side it was argued, that there was no seisin in fact by the elder sister, but at most a seisin in law; and the Court would not incline to extend the operation of the rule, excluding the succession of the half blood, beyond the strict letter of it.

Lord Kenyon said,—Nothing could be clearer than that an infant might consider whoever entered on his estate, as entering for his use. The Court held that the surviving sister did not take by descent: but the lands should go to the heir of the whole blood of the sister who died.

Trust estates are within this rule. 1 Inst. 14 b. Dyer, 10 b.

69. Before the Statute of Uses, it was held that there might be a *possessio fratris* of a use: therefore where a *cestui que* use had issue a son and a daughter by one venter, and a son by another venter, and died; the eldest son took the profits, and died without issue; it was held that the use should descend to the daughter, as sister and heir to her brother, not to the younger son. And since the doctrine of trusts has been established by the Court of Chancery, the rule of *possessio fratris* was applied to trust estates, as fully as to legal ones.

And advowsons, tithes, &c. 1 Inst. 15 b. 3 Rep. 41 b.

70. [Previously to the stat. 3 and 4 Will. 4. c. 106.] advowsons, tithes, and rents, descended to the whole blood, provided there was an actual seisin, by presentation to the church, or receipt of the tithes or rent: but if the eldest son died before the church became vacant, or any receipt of tithes or rent, his brother of the half blood would inherit as heir to his father, who was the person last seised.

1 Roll. Ab. 628. pl. 10.

71. Thus if a person seised of an advowson in gross had issue a son and a daughter by one venter, and a son by another venter, and died; the eldest son died before any presentation; the younger brother would have the advowson, because the elder

Id. pl. 11.

never had any seisin thereof. But if the elder had presented, and died without issue, the younger should not have had the advowson, because the presentation put the seisin in the eldest.

Id. 12 & 13.

72. If two daughters by several venters made partition of an advowson in gross, to present by turns; and after one died without issue, before any presentation; the other would have the advowson; because there was no seisin thereof. It would have been otherwise if she that died had presented after partition.

73. Lord Coke says, the doctrine of half blood extends to offices, courts, liberties, franchises, and commons of inheritance. I Inst. 15 b.

74. [But now (in descents falling after the 1st day of January, 1834,) by the statute above-mentioned, which applies to advowsons, tithes, and all other hereditaments, whether corporeal or incorporeal, actual seisin is not necessary to make a person the root or stock from which the future inheritance is to be derived, but it is sufficient if he was the person last entitled, that is, the last person who had a right to the land, &c., whether he did or did not obtain the possession, or the receipt of rents and profits.] s. 11.

75. The seventh and last canon or rule of descent is,— "That in collateral inheritances, the male stocks shall be preferred to the female; that is, kindred derived from the blood of the male ancestor, however remote, shall be admitted before those from the blood of the female, however near; unless where the lands have, in fact, descended from a female." VII. Canon. The male stocks preferred.

76. Thus the relations on the father's side are admitted *in infinitum*, before those on the mother's side are admitted at all; and the relations of the father's father, before those of the father's mother, and so on. Sir W. Blackstone observes that this rule was established in order to effectuate and carry into execution the fifth rule or principal canon of collateral inheritance, that every heir must be of the blood of the first purchaser. For when such first purchaser was not easily to be discovered, after a long course of descents, the lawyers not only endeavoured to investigate him by taking the next relation of the whole blood to the person last in possession; but also considering that a preference had been given to males, by virtue of the second canon, through the whole course of lineal descent, from the first purchaser, they judged it more likely that the lands should have descended to the last tenant, from his male, than from his female ancestors. The right of inheritance therefore first runs up all the father's side, with a preference to the male stocks in every instance; and if it finds no heirs there, it then, and then only, resorts to the mother's side; leaving no place untried, in order to find heirs that may by possibility be derived from the original purchaser. 2 Comm. 235. See also statute 3 & 4 Will. 4. c. 106. ss. 7, 8. and sup. s. 20. note.

77. After a due consideration of the canons or rules of descent Mode of tracing an heir at law.

already laid down it will not be a difficult matter to ascertain the party on whom the law casts the inheritance, whenever a comprehensive genealogy shall be made out, of the persons connected in blood with the *propositus*, or party last seised: for there is no title in the English law reducible to a more technical system than the title of descent in fee simple. One or the other of two principles only will determine every case of competition on the subject of inheritance at common law. These principles are, 1st, dignity of blood, and 2d, proximity of blood.

1 Inst. 10 a. 12 a.

78. Lord Coke, in his Commentary on Littleton, has partly explained in what order the attribute of dignity of blood is applied by legal intendment. But as the whole subject is susceptible of a compendious arrangement, perhaps it may be satisfactory to enumerate the several classes which by physical necessity must comprehend every description of kindred, and to state the degree of dignity in which they stand to the *propositus*.

79. These classes are,—1. The male stock of the paternal line. 2. The female stock of the paternal line. 3. The male branches of the female stock of the paternal line. 4. The female branches of the female stock of the paternal line. 5. The male stock of the maternal line. 6. The female branches of the male stock of the maternal line. 7. The male branches of the female stock of the maternal line. 8. The female branches of the female stock of the maternal line.

80. The reason and progress of this series will, on a little consideration, appear intelligible. They who trace from the male stock, either in the ascending or descending line, must of necessity trace from a person bearing the name of Stiles, whether it be John, Geoffry, George, Walter, or Richard; and Stiles being the family name, they are all entitled to the first rank of dignity. When these are exhausted, recourse is to be had to those female stocks who have intermarried with the males of the name of Stiles, and have contributed to the blood of the paternal line; such as Cecilia Kempe, Christian Smith, and Ann Godfrey who constitute the second class. Every female having so intermarried, at how remote soever a period, is deemed to be a stock of the same class; and all those of the same class are held to be equal in point of dignity. It is further to be observed that each stock in the ascending line is successively to be exhausted, first in its male, and then in its female branches, before we pro-

See Table of Descents.

ceed to the next immediate female stock, for reasons hereafter to be assigned; and this doctrine gives rise to the third and fourth classes, namely, the male branches of the female stock of the paternal, and the female branches of the female stock of the paternal line. The same gradation takes place in the maternal line, and gives rise to the subsequent, or 5th, 6th, 7th, and 8th, classes, on the same ground as in the paternal line; and therefore it is unnecessary to repeat them.

Thus far in explanation of the first principle.

81. The second principle, or that of proximity of blood, is twofold: it is either positive, or representative. It is positive when parties claim in their own individual right; as between the second and third son, or between the uncle and grand uncle. It is representative when either of the parties claims as being lineally descended from another; in which case he is entitled to the degree of proximity of his ancestor. Thus the grandson of the eldest son of the *propositus* is entitled before the second son of the *propositus*, though, in common acceptation, nearer by two degrees; and the principle of representative proximity is by the law of England so peremptory, that a female may avail herself thereof to the exclusion of a male claiming in his own right; for in descents in fee simple the daughter of the eldest son shall succeed in preference to the second son.

82. Having thus explained the nature of these two principles, we proceed to observe, that the first principle, namely that of dignity of blood, is positive, and operates on all occasions, without reference to any other principle, where it can be shewn that the claimants are unequal in point of dignity of blood, and that they range under different classes of the series as above stated. In all such cases the inheritance will vest, by act of law, in the worthiest of blood. Thus if, according to the Table of Descents annexed, a competition should arise between the issue of Andrew and Esther Baker, and the issue of Richard and Ann Stiles, although the former represent an uncle, and the latter a great-great-uncle, the latter shall prevail, because he is of the first class of dignity, whereas the former falls under the fifth.

83. But when the claimants range under the same class of dignity, the first principle is inert; recourse must then be had to the second, namely, that of proximity; and the claimant

shall be preferred in respect of the proximity of the stock through which he claims to the *propositus*.

84. Thus in a question between the issue of Luke and Francis Kempe, and the issue of William and Jane Smith, in the Table annexed, the parties are equal in point of dignity; for they represent female stocks of the paternal line: but in regard to proximity Cecilia Kempe, the mother of the father, is a nearer stock to the *propositus* than Christian Smith, the mother of the grandfather; and therefore her representative shall succeed.

85. It will be apparent to every person, having thoroughly digested the above system, that it is applicable to any case that can be put on the subject of descent. The clearness and certainty of the common law on this head has been long since remarked by Lord Coke, in his Preface to the second part of his Reports.—"In all my time I have not known two questions made of the right of descents by the common law; so certain and sure the rules thereof be."

Observations on Blackstone's doctrine of Descent.

86. The chief point of difficulty that has occurred has been owing to the want of due attention to the doctrine of representative proximity, which, as is justly observed by Lord Hale,—"through all the degrees of succession by the right of representation, the right of proximity is transferred from the root to the branches, and gives them the same preference as the next and worthiest of blood." In the descending line this doctrine is sufficiently familiar and obvious: but in the ascending line it is not equally familiar, nor has it recently been duly explained. For although by the law of England the principle of representative proximity is equally applicable in the one line as in the other, yet in a Table of Descents affixed to a work of deservedly great celebrity, the doctrine has been rejected, and a different system has been adopted.

87. The work alluded to is that popular treatise, the Commentaries on the Laws of England by Sir William Blackstone, in which, after mature and repeated deliberation, he persisted in a system repugnant to the law of descents, as it had stood and continued in England for upwards of five centuries; and had been successively expounded by Lord Hale, Lord Chief Baron Gilbert, and the ablest writers on the subject. (*a*)

(*a*) [The recent statute, 3 & 4 Will. 4. c. 106. does not extend to descents which have taken place on deaths before the 1st day of January, 1834. A case may possibly

Now, as the Commentaries are justly supposed to contain the pure elements of the English law, and as the learned author has entered into an elaborate discussion of the question, it may be presumed that the rising generation will admit the validity of his reasons without further enquiry, and that his system will be generally adopted. But as we do not concur with the learned commentator, we deem it a mark of respect due to his reputation to consider the reasons assigned by him in support of his opinion, and at the same time to state the authorities which have induced us to pursue a different course of preference in the Table of Descents annexed to this title. (*b*)

88. The doctrine which gave rise to the discussion was stated from the bench by Mr. Justice Manwoode, in the case of Clere *v.* Brook, as reported by Plowden, 442. The question in that case was, whether the heir of the father's mother, or the heir of the mother, were the right heir to the son. The court were unanimous for the former, on account of the dignity of blood of the paternal line.

Justice Manwoode having answered some objections to this decision, observed, that "where they (the competitors) are equally worthy in blood, then the nearest shall be preferred; as if the purchaser die without issue, and the brother of the pur-

happen in which the point discussed in the following pages of the present chapter may come under consideration; the Editor, therefore, did not feel himself at liberty to omit Mr. Cruise's observations. But the late act, in reference to descents falling after the above period, has put the question at rest in favour of Mr. Justice Blackstone's view of the subject, that is, giving the preference to No. 10 in his table before No. 11; and which, in the Editor's opinion, better preserves the symmetry of the law of descents. It will be seen from the following pages that Mr. Cruise gives the preference to No. 11, that is, to the issue of Luke and Francis Kempe, before the issue of William and Jane Smith, whom indeed Mr. Cruise, in his annexed table 1. postpones to the issue of Thomas and Sarah Kempe, No. 12, and to the issue of Charles and Mary Holland, No. 13, in Blackstone's table. The following are the words of the statute, s. 8:—"That where there shall be a failure of male paternal ancestors of the person from whom the descent is to be traced, and their descendants, the mother of his more remote male paternal ancestor, or her descendants, shall be the heir or heirs of such person, in preference to the mother of a less remote male paternal ancestor, or her descendants; and where there shall be a failure of male maternal ancestors of such person, and their descendants, the mother of his more remote male materpal ancestor, and her descendants, shall be the heir or heirs of such person, in preference to the mother of a less remote male maternal ancestor, and her descendants."]

(*b*) [The Editor has added the numeral letters to shew the order in Sir William Blackstone's table.]

chaser's father claim; and the brother of the purchaser's grandfather, that is to say, the brother of the father of the purchaser's father, also claims the land; and the brother of the purchaser's great-grandfather, that is to say, on the part of the father in the lineal ascent of males, also claims the land; then the brother of the purchaser's father shall be preferred as heir, for he is nearest of the blood of the purchaser's father; and they are all equally worthy in blood, for they are all of the blood of the males, which is the more worthy sex, and therefore the nearest shall be preferred as heir. And if there is no such brother of the purchaser's father, nor any issue of such brother, nor any sister of the purchaser's father, nor any issue of her, (for the sister shall be in the same degree as the brother, where there is no brother); then the brother of the purchaser's grandfather or his issue, or the sister of the purchaser's grandfather or her issue, shall be preferred before the brother or sister of the purchaser's great-grandfather and their issues; and so on from them *in infinitum. And so the brother or sister of the purchaser's grandmother,* viz. *the mother of the purchaser's father, shall be preferred before the brother or sister of the purchaser's great-grandmother;* viz. *mother of the purchaser's father's father, because they are equally worthy in blood; for such heirs come from the blood of the female sex, from which the purchaser's father issued; and where they are equally worthy, the next of blood shall always be preferred as heir.*"

To this doctrine Mr. Justice Blackstone objects, and has declared his opinion, that the heir of the *besailes* or great-grandmother on the part of the father, ought to be preferred to the heirs of the *ailes* or grandmother on the same side. Accordingly, in the Table of Descents annexed to the second volume of the Commentaries, he hath preferred the former, whom he distinguishes by No. 10, to the latter, or No. 11, for the following reasons:—

1st, "Because this point was not the principal question in the case of Clere and Brook, but the law concerning it is delivered *obiter* only, and in the course of argument by Justice Manwoode; though afterwards said to be confirmed by the three other justices in separate extrajudicial conferences with the reporter."

2d, "Because the Chief Justice Dyer, in reporting the reso-

lution of the Court in what seems to be the same case (Dyer 314.,) takes no notice of this doctrine."

3d, "Because it appears from Plowden's Report, that very many gentlemen of the law were dissatisfied with the position of Justice Manwoode."

4th, "Because the position itself destroys the otherwise entire and regular symmetry of our legal course of descents; as is manifest by inspecting the Table; and destroys that constant preference of the male stocks in the law of inheritance, for which an additional reason is before given, beside the mere dignity of blood."

5th, "Because it introduces all that uncertainty and contradiction pointed out by an ingenious author, (Law of Inheritances, 2d ed. pp. 30. 38. 61. 62. 66.) and establishes a collateral doctrine incompatible with the principal point resolved in the case of Clere and Brook, *viz.* the preference of No. 11. to No. 14. And though that learned writer proposes to rescind the principal point then resolved, in order to clear this difficulty; it is apprehended that the difficulty may be better cleared by rejecting the collateral doctrine, which was never yet resolved at all."

6th, "Because, by the reason that is given for this doctrine in Plowden, Bacon, and Hale, (*viz.* that, in any degree paramount, the first law respecteth proximity and not dignity of blood,) No. 18. ought also to be preferred to No. 16, which is contrary to the 8th rule laid down by Hale himself. (Hist. C. L. 247.)"

7th, "Because this position seems to contradict the allowed doctrine of Sir Edward Coke, (Co. Lit. 12.) who lays it down, under different names, that the blood of the Kempes (alias Sandies) shall not inherit, till the blood of the Stiles (alias Fairfield) fail. Now, the blood of the Stiles does certainly not fail, till both No. 9. and No. 10. are extinct. Wherefore No. 11, being the blood of the Kempes, ought not to inherit till then."

8th, "Because, in the case, M. 12 Edw. 4. 14. (Fitz. Ab. tit. *Descent*, 2. Bro. Ab. tit. *Descent*, 38.) much relied on in that case of Clere and Brook, it is laid down as a rule, that *cestuy que doit inheriter al pere doit inheriter al fils.* And so Sir Matthew Hale says, (Hist. C. L. 243.) that though the law excludes the father from inheriting, yet it substitutes and directs the descent as it should have been, had the father inherited. Now, it is

settled by the resolution in Clere and Brook, that No. 10, should have inherited to Geoffrey Stiles the father before No. 11, and therefore No. 11, ought to be preferred in inheriting to John Stiles the son."

89. To these reasons full and satisfactory answers appear to us to have been given in a tract intituled, "Remarks on the Laws of Descents, and on the Reasons assigned by Mr. Justice Blackstone for rejecting, in his Table of Descent, a point of doctrine laid down in Plowden, Lord Bacon, and Hale,"—published in 1779. (*a*) And therefore the substance of those remarks shall, for the satisfaction of the student, be here stated.

90. On the first of Sir William Blackstone's reasons the author observes, "that the three introductory reasons are merely speculative: they are rather preliminary observations than arguments from principle; of course the remarks must be of the same nature. As nothing positive can be determined from either, the reader will judge which has the best grounds for presumption.

"It is admitted, that the present point was not the principal question in the case of Clere and Brook: however, as this doctrine was laid down by a judge sitting in court, and delivered in his judicial capacity, some respect is due to his sentiments. And though it may be allowed that the law, delivered *obiter* in the present case, was founded on the same substantial reasons which led to the final judgment; still he will not contend that, because it was delivered *obiter*, it was therefore less reasonable; or, because it was said to be confirmed by the three other justices, that it was not their opinion, or that it was a bad opinion."

Dyer, 314. On the second reason, he remarks, that "the report of Sir James Dyer is extremely short: for the Court were unanimous in their resolution. But, as he hath not given the distinct opinion at large of any of the Bench, even to the point before them,—can we reasonably expect him to take notice of any collateral matter? If we wish to hear the arguments, Plowden hath reported them. If we are not satisfied,—whither can we refer ourselves? May it not hitherto be said, *Est ridiculum ad*

Pro Archia.

(*a*) By William Osgoode, Esq. of Lincoln's Inn, afterwards Chief Justice of Lower Canada.—*Note to former edition.*

ea quæ habemus nihil dicere, quærere quæ habere non possumus? Thus stands the fact. Plowden gives a comprehensive report of the case, and the doctrine laid down, when the Court gave their opinion. Dyer reports the judgment with a brief state of the question: but takes no notice of this, nor any other doctrine. So far then the one is positive, the other neutral. Are we now to discredit the representations of the former, and conclude, from the silence of the latter, by an argument made up of incredulity and uncertainty, to reject the only testimony given, and extort evidence from a nullity? This were to support a cause in the most effectual manner. From Plowden it appears, that the Chief Justice was present when Manwoode delivered this as law. What, then, can we infer from his silence, except his consent?"

To the third he replies, that "the account, given by Plowden, is thus subjoined in a note to the report of the case. 'Note, in the case before put, where the purchaser in fee dies without issue, and the brother of the grandmother on the part of the father claims the land as heir, and the brother of the great-grandmother also on the part of the father claims the land as heir, many were of opinion, because there was no nearer heir of the male line, the brother of the grandmother should not be preferred, as Justice Manwoode had said, but that the brother of the great-grandmother should be adjudged heir, for his blood is derived to the purchaser by two males, *viz.* by his father and grandfather, whereas the blood of the brother of the grandmother is derived to the purchaser but by one male, and the grandfather was not of the blood of the brother of the grandmother, but he was of the blood of the brother of the great-grandmother, and therefore such blood is more worthy. And upon this I put the question again to Manwoode in the presence of Harper, another of the justices of the Common Bench, both of whom held clearly that the brother of the grandmother should be heir to the purchaser, and not the brother of the great-grandmother, because the former is nearer in blood to the purchaser on the part of his father, which proximity holds place on the part of females conjoined by marriage to males, when such blood is once derived by a male to the first purchaser. And another day I put the same question to Mounson, puisne judge of the same Bench, and he was of the same opinion with

the other justices, for the same cause. And at another time afterwards, I put the same question to the Lord Dyer, who was of the same opinion also; so that all the justices of the Common Bench unanimously agreed in the same case, that the brother of the purchaser's grandmother on the part of the father, should be preferred before the brother of the purchaser's great-grandmother on the part of the father.'

"Thus the same report, which tells us that many held a different opinion, tells us likewise, that this position of Justice Manwoode was confirmed by Justice Harper, Justice Mounson, and Lord Chief Justice Dyer. Therefore, when Lord Bacon and Hale adopted this position, they had the unanimous authority of the Bench to support it: when the author of the Commentaries disallowed this position, he was justified by the scruples of many bye-standers to reject it. It remains to be inquired, who has been guided by the most sufficient reasons. The authority must surely preponderate with us."

On the fourth reason he observes, that "it may be a matter of surprise, that the first pointed argument against Justice Manwoode's position should be brought from a topic so irrelative as that of symmetry; for law is the object of reason, not the subject of delineation. The laws of descent are regulated by the analogy of their principles, not by the symmetry of a table; and, when a system of inheritance is established, little attention is paid to the appearance it may make in a scheme of genealogy. Being therefore confident, and meaning to prove, that our doctrine is founded upon legal principles, we are not careful in the first instance for the subordinate concern of symmetry. And in this spirit, admitting for a moment that our position destroys the regularity of the Table, we mean to defend it on the strong ground of consistency. For, if we cannot unite both qualities; if a sacrifice must be made;—which shall we surrender?—the congruity of our principles, or the symmetry of their delineation? If the eye be offended by irregularity; to avoid this, shall we disgust the mind by incongruity? Can we hesitate which to give up, the reality or the representation, the substance or the shadow? Those remarks might be made, if the learned author meaned to apply the absolute idea of symmetry, and to require the same in the draught of a course of descent. But it may be urged, he hath guarded against the

pertness of such interrogatories, by specifying the symmetry of the legal course of descents, which must be relative. In such case, before we can confess, deny, or retort the charge, we must acquaint ourselves with the nature of the thing destroyed; and in what manner it is connected with the subject.

"The legal course of descent is chalked out by the laws of inheritance: the symmetry of which course arises from a due exemplification of those laws, agreeably to the principles thereof. And it is constituted by, and can only exist so long as the course of descents conforms itself to, the legal principles of inheritance. The idea of symmetry is conceived, and regulated, by such conformity, in which sense it is altogether relative. In short, the entire and regular symmetry of the legal course of descents is nothing more than that order, which is observable in a praxis of those principles, whereby the course is directed.

"Thus, the legal symmetry of the Table will finally resolve itself into a conformity to the principles of descent, to which an appeal is more direct than to the medium of delineation. For if, by any position, one of the principles of descent is violated; by the same, will this symmetry be also destroyed.

"Let us then compare the position of Manwoode with the principles above stated; and we shall discover whether the charge contained in this fourth reason be well founded.

"The doctrine laid down by Manwoode is, that where all the branches or descendants of the male stock are extinct, the brother or sister of the mother of the purchaser's father, or No. 11, shall inherit and be preferred before the brother or sister of the purchaser's great-grandmother, or No. 10, for whom Mr. Justice Blackstone contends.

"First, in point of dignity of blood, the claimants are equal: they represent female stocks of the paternal line; therefore, upon that ground merely, the one cannot be preferred to the other. But,

"Secondly, in point of proximity, it is obvious that the grandmother, or No. 11, is nearer to the person last seised than the great-grandmother, or No. 10; on which account the representatives of the former are preferred by Justice Manwoode.

"It follows, then, that this position, being supported by the

principles of inheritance, cannot destroy that regular symmetry which arises from a conformity to those very principles.

"On the contrary, let a person, having a distinct and perfect conception of the several classes of dignity, with the notion of proximity superadded, view the Table; he will trace from the *propositus*, and expect that, when one class is exhausted, the number denoting immediate preference will be affixed to the nearest claimant of the ensuing class. For instance, in the male stock of the paternal line ascending, he will find the inheritance regularly given to the nearest representative, first, to the uncles and aunts, or No. 7, then to the great-uncles and aunts, or No. 8, and so on, till the class is exhausted: but when he comes to the second class, or female stocks of the paternal line, he will revolt at the preference given to the more remote from the *propositus*, and contend that the legal course of descents is destroyed in that instance; and that the violation thereof is increased by the contrast with the maternal line, where due regard is paid to proximity, and the regular order preserved.

"The second clause of this fourth reason contains a charge, which reduces us to the necessity of inquiring whether the matter be rightly understood between us? Whether we are agreed upon terms? Otherwise, in what manner can this position 'destroy the constant preference of male stocks,' when, by the question, they and their descendants are extinct? For were there any male stocks, or their representatives surviving, they would certainly succeed; and there would be no contest between the present competitors. If No. 11 be appointed immediately after No. 9, it will certainly destroy the preference of No. 10:—but, does No. 10 being the representative of Christian Smith, represent a male stock? In fact, what possible pretensions can either of the claimants have? That both are of the paternal line is granted; but it is evident that the brothers and sisters of Cecilia Kempe and Christian Smith are the representatives of female stocks; and, be the preference given to either, surely the 'preference of the male stocks' cannot be destroyed thereby: for, as the question is fairly stated by a learned Chief Baron, the 'blood of the father's mother was preferred to the blood of his grandmother, being *both female bloods;* and both

Gilb. Ten. 19.

coming under the consideration of ancient tenants, the nearer tenant's blood was preferred to the more remote.

"But, if it be contended that the blood of Christian Smith may be traced through the male stocks of the paternal line, it is granted. But may not the blood of Cecilia Kempe, be traced through a male stock to the *propositus* likewise? And, as Harper says 'proximity holds place on the part of females conjoined by marriage to males, when such blood is *once* derived by a male to the first purchaser.' And such connexion with the paternal line is the avowed reason of the preference. *Le frere le* ailes *sera heir al purchasour, et nemy le frers le* besailes, *pur ceo que il est plus prochein en sanke al purchasour del part de son pere.* The laws of England do certainly prefer the descendants from the male and female stocks of the paternal line; and, should any system overlook this distinction, it would be no difficult matter to controvert it. But, in the present case, we have nothing to apprehend from that objection, nor 'from the additional reason before given;—for what is it? The argument of probability, the reasonable proof required by the law, that the claimant be *next* of the whole blood to the person *last* in possession, (or derived from the same couple of ancestors,) which will probably answer the same end, as if he could trace his pedigree in a direct line from the first purchaser.' Now, who are the next couple of ancestors who have issue, and in whose favour the argument of probability ought to weigh? The answer is, Luke and Francis Kempe; from whom the person last in possession, and No. 11, are both lineally descended. Nevertheless, the author of the Commentaries contends for the issue of William and Jane Smith, a more remote couple of ancestors; not recollecting his observation, that 'the higher the common stock is removed, the more will even the probability decrease.'

Plowd. 450.

2 Comm. 228.

2 Comm. 231.

On the fifth reason he remarks, that "when the reader shall be made acquainted with the nature of these uncertainties and contradictions, it will be a matter of surprise, that a learned man should suggest them; and of still greater surprise, that a really learned man should repeat them. In the first place, it will be manifest, by consulting the work of the ingenious author quoted, that the charge of all those uncertainties and contradictions is brought against the first grand principle of the laws of inheritance; and therefore this charge, even if it were valid, is

Law of Inh. 30.

not to be pointed against any particular application of the principle, but against its general application. Hence it is equally to be brought against Justice Blackstone's position, as against that of Manwoode.

" The charge is this :—' Here I would raise a *quære* or *dubitatur*, whether the descendants from the collateral ancestors of the *several* classes, (or Nos. 10. 11, 12, 13,) are inheritable or not, before the mother's brother (or No. 14.) And, in my opinion, the doctrine seems, either way, chargeable with some repugnance: for on the one hand, if they are to be preferred to the mother's brother (as I conceive the law is), then it directly impugns and impeaches the rule, which gives the inheritance *ratione proximitatis* to the brother or sisters of the paternal grandmother, (or No. 11,) in preference to the brothers or sisters of the maternal aunt of the grandfather, (or No. 10,) on this foundation as it is alleged, because *proxima non remota causa in jure spectatur*: and, if the descendants from the collateral ancestors are not to be preferred to the mother's brother, but to be totally excluded, this would be absurd; forasmuch as then the paternal uncles and aunts of the mother and the grandmother of the paternal line should not be capable of inheriting; when the descendants from the brothers and sisters of the remotest feme, in the direct line, are held to be inheritable.'—That is to say, it is inconsistent that the principle of proximity shall take place between the claimants Nos. 10, 11, 12, 13, and not between them and No. 14, which represents the mother's brother, and is certainly nearer than any of the classes above mentioned. Now the reader sees, that for want of a discretive judgment, to discover that the said several classes of collateral ancestors, though more remote than No. 14, yet they are of the paternal line; the ingenious author cited has perplexed the question by applying the test of proximity between them and the mother's brother, who is of the maternal line, and consequently shall not inherit till the paternal line be exhausted: whereas that test should never be applied, but where the parties are equal in point of dignity. Let it be further observed, that this charge, futile as it is, is not brought particularly against No. 11, the class for which we contend, but against the *several classes* represented by Nos. 10, 11, 12, 13. It is not brought specifically against Justice Manwoode's position, as this fifth reason would insinuate, but

against 'the descendants of the collateral ancestors of the higher classes;' among others comprehending No. 10, the class for which Mr. Justice Blackstone contends. Does it not then argue a great degree of partiality, when a general objection is brought (good or bad, no matter), not to regard our own case, but to enforce it against another, which, by confession, is in the same predicament? Yet the author of the Commentaries, whose own position, as favouring the more remote claimant, is most obnoxious to this censure, disregarding his own situation, hath brought the whole weight of the charge on the devoted system of Manwoode.

"If we may avail ourselves of the opinion of this author, where he simply informs us what the law is, (not what it ought to be,) we shall find that he concurs with Justice Manwoode, and all the elder writers. He puts the case at present in question, and decides it thus: 'If the male stock of the paternal line is totally extinct at the death of the purchaser, then the inheritance will devolve on the heirs of the *father's mother*, or No. 11; and, when they are extinct before entry, then it goes to the heirs of the grandfather's mother,' or No. 10. Again, he justly censures the reason given in defence of J. Blackstone's opinion, that *more* of the purchaser's male ancestors have been descended from and born of the femes in the higher classes. 'If this argument must be allowed to have any force at all, it proves too much; and will conclude, if it concludes any thing, for the highest class,' or the representatives of Ann Godfrey. Law of Inh. 30. 61.

"So far, then, the charges of uncertainty and contradiction, though groundless, were not pointed by the learned writer against one system more than the other. His deliberate opinion supports our argument, and is directly contrary to that of Mr. Justice Blackstone.

"Again, this position is charged with 'establishing a collateral doctrine, incompatible with the principal point resolved in the case of Clere and Brook.' If the nature of this collateral doctrine had been precisely stated, it would have been more satisfactory; as then we might have gone immediately to the point. At present we will state the only part of the case which carries (as we conceive) the least appearance of incompatibility.

"The circumstance that would most strike a person unacquainted with the principles of descent, is, that in the case men-

tioned, the more remote claimant was preferred; whereas at present we contend for proximity. He is answered, in that case the more remote claimant was the more worthy in blood, which shall always supersede proximity; but, in the present case, they are equal in respect of dignity of blood, in which situation we can only resort to proximity. We do not mean to insult the learned Judge, by proposing this as an objection on his part; it is unworthy of him; and we have only to lament, that the nature of the charge is such, that we can only make a general defence, by pleading not guilty. To establish this incompatibility, it should be proved that No. 10. is more worthy than No. 11.: this hath not been attempted. Therefore if the reputation of the commentator did not prevent us from making hasty conclusions, we should be well justified in treating this charge as a violent assumption.

"On our part, it will be sufficient to shew, that the point settled and the point contended for do both conform to the principles already stated. In the first instance the claimant took on account of dignity of blood: in the second, that principle did not operate. No. 11. ought therefore to take on account of proximity. We shall not enter further into the detail, as the reader can easily apply both cases to the same system. It will not then readily appear, in what manner this position can establish a doctrine incompatible with the point settled.

"Till a more direct charge be brought, this, we hope, will be a sufficient vindication; and now we are upon the subject, we retort the accusation. We say, that in the Table of Descent, the preference given in the paternal line is incompatible with the preference given in the maternal line. And as we disapprove of general charges in our own case, it is fitting that the objections we bring should be particular.

"In the paternal line, Cecilia Kempe and Christian Smith are female stocks; and the representatives of the latter, though more remote from the person last seised, are preferred to the former for this reason, because their blood is derived to the person last seised by two males.

"In the maternal line, Hannah Willis and Susan Bates stand in the same point of relation with the two above named, the difference of line excepted; and though the representatives of Susan Bates derive their blood from the person last seised by

two males, and are precisely in the same predicament with those of Christian Smith, with respect to blood, still they are not preferred in the maternal line; which is incompatible.

"The fact is, that, in the maternal line, the Table of Descent is properly delineated: the principles of dignity and proximity are invariably pursued throughout: in the paternal line, they are not. No wonder, therefore, they are incompatible."

To the sixth reason he replies—"It is admitted that Lord Bacon expresses himself in these direct terms: '*In any degree paramount the first, the law respecteth proximity, and not dignity of blood.*' But, after a tedious search, we could find no such terms nor doctrine in Plowden. Perhaps it would be a difficult matter to point it out; though, to discover the opinion really delivered on the occasion, we have only to refer to p. 449, where we find in what express terms a doctrine is laid down, altogether contrary to that stated in the reason. 'If one claim from the father's mother, and another claim from the great-grandfather direct, the latter shall be preferred; *et uncore l'autre est plus prochein del sanke, mes est miens digne de sanke.*' Plowd. 449.

"Likewise, after a diligent search, we could find no such doctrine in Hale; and, till we are referred to the doctrine we cannot find, we must content ourselves with such information as we can find. His first rule is this: 'The law prefers the worthiest of blood: those of the male line shall be preferred *usque infinitum.* Again, if the great-great-great-grandfather, or the great-great-great-grandmother of the father has a brother or sister, she shall be preferred, and exclude the mother's brother, *though he is much nearer.*' Hale Hist. C. L. 271.

"Thus, though from the nature of the thing we cannot strictly prove that no such doctrine appears in Plowden nor in Hale, still we have brought the best possible proof from their own words, whereby it is evident they put forth doctrines directly contrary to those suggested. For more satisfactory evidence, we refer the readers to their respective works, which, contrary to the laudable precision our author usually adopts, he hath cited at large without any particular reference. Though we much suspect that their researches on this head will, like our own, be fruitless."

If, then, it be allowed, that these opinions do not in anywise appear, it is impossible they should appear as the reasons given

for any particular doctrine. But if the avowed reasons of the doctrine we support be required, Plowden's have been stated. Sir Matthew Hale says, "And though it be also true, that the great-grandmother's blood has passed through *more males* of the father's blood than the blood of the grandmother or mother of the father; yet, in this case, the father's mother's sister shall be preferred before the father's grandmother's brother, because they are all in the female line, viz. *cognati*, and not *agnati*; and the father's mother's sister is nearest, and therefore shall have the preference as well as in the male line ascending, the father's brother or his sister shall be preferred before the grandfather's brother."

"With respect to Lord Bacon's position, we shall simply observe, that, as it is totally repugnant to the spirit of those laws, whence the doctrine of descent originates; so it has been contradicted by every writer on the subject, and is therefore inadmissible. When we recollect the obligations in general science that are due to this sublime and penetrating genius, let not this mistake be remembered; when our admiration leads us to consider him as some superior being, even this error may convince us that he was human."

"Upon the whole, then, it appears that Lord Bacon mistook the reason of this doctrine entirely: and the author of the Commentaries, observing the error, hath unwittingly imputed the same to Plowden and Hale; which, being a refutable position, is brought to create an inconsistency in Hale's doctrine. Whereas, the perfection of his system will thereby more forcibly appear, inasmuch as nothing irregular can possibly square with it. How far the multiplicity of learning, our author was obliged to consult, may have occasioned this mistake, we know not: but are assured that, however his system may be continued, he will not suffer imputed opinions to remain on record against those respectable characters, so contrary to their professed sentiments, and which reduce them to an absurdity."

On the seventh, he observes, that "it is an incontrovertible point, that the blood of the Kempes shall not inherit, till that of the Stiles fail. There is likewise no question, whether it fails at No. 9, which bears the name of Stiles. But the case is not altogether so obvious with respect to No. 10, notwithstanding that these two numbers are coupled together, as if one and the

same reason made them similar instances. For, on examination, it will be found that the name to which that number is affixed, is Smith. However, on tracing upwards, we shall find that, some generations back, the great grandfather of John Stiles married a certain Christian Smith; who is supposed to have representatives still living. We must therefore admit, that a portion of the blood of the person last seised may be traced to No. 10, or the said Christian Smith, as to a female stock of the paternal line; and not, as seems by the reason to be insinuated, as if it were of a degree to be mentioned in point of dignity with No. 9.

"It is then admitted, that the blood of John Stiles does not fail, while No. 10 exists.

"But it will likewise be found, that George Stiles the grandfather married Cecilia Kempe. Now, according to Sir Edward Coke, 'the father hath two immediate bloods in him, the blood of his father and the blood of his mother (or Cecilia Kempe), and both these bloods are of the part of the father.' And, by consulting the Table of Ancestors in the Commentaries, B. 2. c. 14. it will appear that the Smiths contribute one-eighth, and the Kempes one-fourth, of the blood of the person last seised; or, to adopt the expression of the ingenious author lately cited, 'the grandmother furnishes a double portion of consanguinity, to what the great-grandmother does.' It is then evident, that, as the blood of John Stiles does not fail, while No. 10. exists; so, neither does it fail, while any of the representatives of the grandmother, or No. 11, exist. Law of Inh. 62.

"Since this is necessarily the case, how shall we account for the distinction so visible in the text, where the name of Smith is omitted, and the number representing it is found in such worshipful society; whereas great care is taken to inform us, that No. 11, though representing a much nearer relation, is of the blood of the Kempes, and therefore to be postponed?

"This question we do not undertake to solve.

"But having discovered, what was unobserved in the present reason, that when the name of Stiles is no more, still the blood of the paternal line flows in two channels, are we to admit the conclusion which appears so deliberate; or are we to advance the neglected No. 11, whose title previously presents itself upon

a regular tracing, and in many other respects appears to be so justifiable?

"If we advert to our author's own computation so lately mentioned, we shall perceive that the relation between No. 11. and the person last seised, is much nearer than the relation between No. 10. and the person last seised. However, we shall avail ourselves no farther of this observation, than to presume it is very fair ground, whereon to produce at least the simple claim of No. 11: the right may be discussed afterwards.

"The case of the claimants is such as hath been already stated: we will apply to a decision from which there will be no appeal.

"The reader is desired to cast his eye on the Table of Descents, and to mark in what degree the two competitors stand. The rule to guide his judgment is thus laid down by the author
2 Comm. 226. of the Commentaries:—'In order to ascertain the collateral heir of John Stiles, it is, in the first place, necessary to recur to his ancestors in the first degree; on default of which we must ascend one step higher, to the ancestors in the second degree; then to those of the third and fourth; and so upwards *in infinitum*, till some ancestors be found, who have other issue descending from them beside the deceased, in a parallel or collateral line. From these ancestors the heir of John Stiles must derive his descent;' as the question is now concerning the collateral heir. In obedience to this rule, let us recur to the first degree: ancestors there are none living; to the second, by the question they are extinct. In the third, we find No. 11, or the representatives of the paternal grandmother. If, for the sake of speculation, we pursue our enquiries, we may find collateral ancestors in the fourth degree, or No. 10.: but the inheritance is previously vested; it is cast on No. 11. Again, in the
2 Comm. 223. Commentaries, we find this direction: 'In order to keep the state of John Stiles as nearly as possible in the line of his purchasing ancestors, it must descend to *the nearest couple of ancestors*, that have left descendants behind them.' Those ancestors who have left descendants are Luke Kempe and Frances Holland, and William Smith and Jane King. Can it now remain a doubt which is the nearest couple, or whose issue shall succeed?

"Such being the case, we cannot possibly admit of the con-

clusion, 'that No. 11, being the blood of the Kempes, ought not to inherit till No. 10 is extinct.' For, to retort the distinction so invidiously made in this seventh reason, No. 10. represents the blood of the Smiths, and is not descended from so near a couple of ancestors as No. 11; and therefore we are authorized to enquire, why has not their issue the same degree of preference in the Table, that we are taught to give them by the text."

With regard to the eighth, he remarks, that "this reason has a most formidable appearance. The approaches are perfectly regular. Two authorities are brought to establish a point of doctrine; which point is applied to a case resolved, and the inference seems fatal to our system. To make a regular defence, it is our duty to examine, whether the authorities and acknowledged maxims of descent do support such a doctrine; then, whether it is well applied to the case resolved; and whether such inference follows of necessity.

"The first authority is from the Year Book, Mich. 12 Edw. 4. 12. The case, in which the rule was originally introduced, is thus stated. 'Where a man purchases land, and dies without issue, and without heir on the part of his father, his next heir on the part of his mother shall have the land. And, if a man purchase land, and hath issue and dies, and the issue enters and dies without issue, and without heir on the part of his father, that is to say, on the part of the father's male ancestors, that in such case, the heir on the part of the mother of his father, that is to say, of his paternal grandmother, ought to inherit; *for he, who ought to inherit the father, ought to inherit the son.* Catesby moved, that where the issue was once seised, that the descent was cast in the blood of the father; therefore it shall never resort to the blood of the father's mother, &c.; no more than where a man purchases lands, and dies without issue, where, if the land descends to the heir of the father on account of the dignity of blood, who is seised and afterwards dies without issue and without heir, then the blood on the part of the mother ought not to inherit, for it is different blood. To which it was answered, that the cases are by no means similar; for when the inheritance descends to collateral blood, it shall not resort to other blood, &c. But it was held, that if a man purchase land and has issue, who takes the land by descent, and afterwards the issue dies without issue, and without heir on the

part of the father, that the heir on the part of the son's mother ought not to inherit; for he is not of the blood of the first purchaser, that is, he is not of the blood of the father: but the heir of the son, on the part of the *ailes*, that is, of the mother of the father, ought to inherit, &c. *quod nota.*'

"Such is the first authority; and before we make any remarks on the manner in which it is applied, we must express our surprise, that an argument should be drawn from a case, that we might justly cite in support of our own system. For, the question between Manwoode and Justice Blackstone is this:—When all the representatives of the male stock of the paternal line are extinct, who shall succeed? The former says, the heir of the *ailes;* the latter the heir of the *besailes:* but what is most singular, to support his argument, an authority is brought, which upon the same question gives the succession to the *ailes.* 'The heir of the son, on the part of the *ailes*, ought to inherit.'

"The next authority to support the point of doctrine, is a quotation from Sir Matthew Hale. We shall take the liberty of making a larger extract, that by the context the reader may comprehend the full scope of his meaning.

"If the son purchases land in fee simple, and dies without issue, those of the male line ascending, *usque ad infinitum*, shall be preferred in the descent according to the proximity of degree *to the son.* And therefore the father's brothers and sisters, and their descendants, shall be preferred before the brothers of the grandfather and their descendants; and if the father had no brothers nor sisters, the grandfather's brothers and their descendants; and, for want of brothers, his sisters and their descendants, shall be preferred before the brother of the great-grandfather: for although by the law of England, the *father or grandfather* cannot immediately inherit to the son, yet the direction of the descent to the collateral ascending line is as much as if the father and grandfather had been by law inheritable, and should have inherited to the son before the grandfather, and the grandfather before the great-grandfather; and consequently if the father had inherited and died without issue, his eldest brother and his descendants should have inherited, before the younger brother and his descendants; and, if he had no brothers but sisters, the sisters and their descendants should

have inherited before his uncles, or the grandfather's brothers and their descendants; so, though the law of England excludes the father from inheriting, yet it substitutes and directs the descent, as it should have been, had the father inherited, *viz.* it lets in those first, that are in the next degree to him.'

" Such is the second authority; and it is presumed the reader will be of opinion, that by this detail the learned Chief Justice meant to exemplify the doctrine of proximity by its several degrees; and to inform us, that though the father, grandfather, and great-grandfather cannot immediately inherit, still we must resort to them as to the stocks whence we are to trace proximity and primogeniture. And to this rule he hath referred the matter at present in question, which he hath stated and decided in the following terms.

" ' When the son is once seised, and dies without issue, his grandmother's brother (or No. 11.) is to him heir of the part of his father; and, being nearer than his great-grandmother's brother, is preferred in the descent.' An opinion, so clear and decisive on the question itself, will allow us to pay little regard to the construction put on a detached sentence from the same authority, in order to support a contrary argument. And here we must observe, that though it be allowable, where an author involves himself in contradictions, to oppose one part of his doctrine to another; still it is to the last degree uncandid, when he is consistent, to force a distinct assertion into the service of an argument that he disavows.

" Upon the whole, we think the citation from Hale a very full comment on the *dictum* advanced in the Year Book. And that the learned author so understood the same, is obvious from the following passage. ' Now, here it must be observed, that the lineal ancestors, though (according to the first rule) incapable themselves of succeeding to the estate, because it is supposed to have already passed them, are yet the common stocks, from which the next successor must spring.' 2 Comm. 226.

" Thus then we admit both authorities; but, what is most material, we see on what occasion and to what intent they were originally laid down. When therefore they shall be cited to establish a future argument, we shall know how far their influence extends; and, knowing to whom the inheritance was given, we may judge with what propriety a reference is made thereto.

But, if these very authorities be advanced for the purpose of giving the inheritance to another, what shall be then said? Shall we not ask, is it candid to adopt a rule, and to apply it so as to produce a consequence, totally different from the original conclusion? For it is evident, that the purpose of introducing these authorities was to collect an inference or point of doctrine therefrom, which, though not delivered in express terms, is nevertheless made and adopted. To have stated it openly would have alarmed the reader: but the doctrine insinuated is, that on account of the rule *cestuy que doit inheriter al pere doit inheriter al fils*, in searching for the heir of the *son* we ought to trace from the *father*, as from the *propositus*. Reference is then made to the case of Clere and Brook, for reasons that we shall presently discover. However, in the first place, it is presumed no such doctrine can be gathered from the authors cited; and we have now to examine whether, if it be a point, it is consistent with the laws of descent.

"First, that the learned Commentator, in a former instance, put a much more liberal construction on the *dictum* in the Year Book, may be gathered from the following passage.

2 Comm. 223. "'This, then, is the great and general principle, upon which the law of collateral inheritances depends; that, upon failure of issue in the last proprietor, the estate shall descend to the blood of the first purchaser; or that it shall result back to the heirs of the body of that ancestor, from whom it either really has, or is supposed by fiction of law to have, originally descended; according to the rule laid down in the Year Book, Fitzherbert, Brook, and Hale, that he, who would have been heir to the father of the deceased' (*and of course to the mother or any other purchasing ancestor,*) 'shall also be heir to the son.' Now, if any one chose to adopt the passage contained in the above parenthesis, in the same manner as the *dictum* in the Year Book is, in the present case, applied to make the father become the *propositus*; it might thereby be proved, that as he, who would have been heir to the mother, shall also be heir to the son, so therefore the mother ought to become the *persona proposita*.

"Secondly, in contradiction to this doctrine is the approved
2 Comm. 209. maxim, *Seisina facit stipitem*; and, 'as the seisin of any person makes him the root or stock, from which all future inheritance by right of blood must be derived,' on the authority of the

Commentaries, which also tell us that 'the law only requires Id. 228.
that the claimant be *next* of the whole blood to the person *last* in possession,' we conclude that the son being the person last seised, he shall be the root or stock from which such inheritance must be derived.

"Thirdly, if we are to trace from the father, it will introduce universal confusion; it will confound the distinction made by Sir Edward Coke, 'that the father hath two bloods in him, by which means the father's mother, though of the female line to him, is of the male line to the son.' For, if we are to trace from the father, his mother must be of the female line to the son; and, what is still more injurious, in such case the whole maternal line will be totally excluded, for there is no privity of blood between the father and the line of the mother.

"Thus have we endeavoured to prove, that no such point has been nor can be established. We now contend, that the case to which it is applied, the resolution in Clere and Brook, is indirectly stated. It was there settled, that the heir of Dorothy Young, the paternal grandmother of the person last seised, should succeed in preference to Edward Clere his mother's brother; that is, No. 11. shall succeed to John Stiles the son. Whereas we are told in the Commentaries, who might or *should* have succeeded to Geoffrey Stiles the father. That No. 10. should have inherited to Geoffrey Stiles the father before No. 11. This may be true, if John Stiles the son had never been seised: but, the contrary being the case, there was no question who should have inherited the father. The matter settled was, that No. 11. should inherit the son. This indirect stating of the case leads us to the reason why the point above mentioned was attempted to be established. It was introduced with a view to discard the son; and that the father should become the *propositus or root*, to whom No. 10. is exactly in the same relation as No. 11. is to the son. Now, can there be a more presumptive proof how far the judgment is here sacrificed, than the forced construction put upon different texts in order to establish a point for the purpose of getting rid of the son? For, when once that is effected, when once we trace from the father, No. 10. will certainly inherit. But, as the fact is otherwise, as the son is the person last seised, shall not No. 11. confessedly succeed?

"The negative application of the rule is this:—Because the issue of Luke and Frances Kempe, or No. 11, should not have inherited to the father, *therefore* they shall not inherit to the son. Now it is certain, that not one person of those represented in the Table of Descents, from No. 14. to No. 20. inclusive, shall ever inherit the father:—but who will be found to contend, that therefore not one of them shall inherit the son?

"However, by virtue of this liberal rule, John Stiles is utterly excluded, as though he had never existed; notwithstanding we are told by the author himself that John Stiles held the land as a feud of indefinite antiquity. Let us then for a moment admit of the delusion, and refer ourselves to Geoffrey Stiles the father. Now, if the heirs of Christian Smith shall inherit John Stiles, as by the Table they do, by parity of reason, must not the heir of Ann Godfrey succeed to Geoffrey Stiles? To hesitate were useless; their respective relation is the same; if the heirs of the great-grandmother shall succeed in one instance, they shall in another, or there is no virtue in consistency. Nevertheless, having once secured Geoffrey Stiles as the *propositus*, the system of the Table of Descents is deserted; and appeal is made to the resolution in Clere and Brook: so that, when Justice Manwoode argues rightly from the son, the doctrine is reprehensible; whereas no scruple is made, in tracing from the father, to admit the same arguments.

"To pursue the proposed plan of defence, we should continue to examine whether such inference follows, as is suggested from the stating of the case resolved. But we are prevented by the express prohibition of our author: who, perhaps not thinking he should ever adopt a contrary opinion, hath in effect told the student, that if any case be put except as from John Stiles, he
2 Comm. 240. should not admit it. The words are,—'The student should bear in mind that, during this whole process, John Stiles is supposed to have been last actually seised of the estate; for, if ever it comes to vest *in any other person* as heir to John Stiles, a new order of succession must be observed upon the death of such heir; since he, by his own seisin, now becomes an ancestor or *stipes*, and must be put in the place of John Stiles.'

"Had we previously attended to this admonition, we should have found that our arguments against the appointment of George Stiles the father, as the *stipes*, were needless; for in such

case a new order of succession must be observed, and the student is forewarned accordingly. Can we therefore, with any propriety, pursue our inquiries respecting the inference, when we are forbidden to admit the proposition?

"Upon the whole, we presume to have shewn, that of the foregoing reasons, the first, second, and third, are merely speculative; the fourth is drawn from an inapplicable medium, and a charge which is contradicted by the express words of Plowden; the fifth depends upon a distorted authority, and violent assumption; the sixth on a misquotation; that the seventh involves a contradiction between the Table and the text; and of the eighth it will not be deemed intemperate to say, that it collects a point of doctrine from authorities by which that doctrine is opposed, which point is applied to a case we are directed not to allow, and from which an inference is drawn, though we are enjoined not to admit of the premises." (*a*)

(*a*) A case exactly in point arose on the Midland Circuit in 1805, and was intended to have been argued in Westminster Hall, but was compromised. Several eminent counsel were however consulted, among whom was the late Mr. Serjeant Williams; and they were all of opinion that Sir W. Blackstone's doctrine was wrong.—*Note by Mr. Cruise.*

CHAP. IV.

Descent of Estates in Remainder and Reversion.

SECT. 1. *Go to the Heirs of the Person in whom they first vested.*

SECT. 2. *A Right to a Remainder goes to the half Blood.*

18. *An Act of Ownership operates as a Seisin.*

SECTION I.

Go to the heirs of the person in whom they first vested.

THE rules laid down in the preceding Chapter respecting the descent of estates in possession did not [previously to the late statute 3 & 4 Will. 4. c. 106.] apply to the descent of estates in remainder or reversion, expectant on an estate of freehold; because where there was a preceding estate of freehold, the actual seisin was in the possessor of that estate, and not in the person entitled to the remainder or reversion: [neither do those rules now apply to descents of estates in remainder or reversion

s. 11. which have occurred upon deaths before the 1st day of January 1834.]

2. It followed from the above principle, that where a person entitled to an estate in remainder or reversion, expectant on a freehold estate, died during the continuance of the particular estate, the remainder or reversion did not descend to his heir; because he never had a seisin to render him the stock or root of an inheritance: but it descended to the person who was heir to the first purchaser of such remainder or reversion, at the time when it came into possession.

Ratcliff's case, 3 Rep. 42 a.

3. Thus it was laid down by the Court of King's Bench, in 34 Eliz. that "Of a reversion or remainder expectant on an estate for life, or in tail, there he who claims the reversion as heir, ought to make himself heir to him who made the gift or

1 Inst. 14 a. n. 6. lease; if the reversion or remainder descend from him: or if a man purchase such reversion or remainder, he who claims as heir ought to make himself heir to the first purchaser."

4. In the case of Kellow *v.* Rowden it was held by all the judges, that where an estate for life or in tail is created, and the reversion in fee expectant thereon descends from the donor or settlor, through several intermediate heirs, before it falls into possession; every person claiming it by descent must make himself heir to the donor or settlor, and take it as such; and not as heir to the intermediate heirs, who need not be so much as named in an action brought against the person so acquiring the possession, as heir to the donor or settlor. For the intermediate heirs never had such a seisin as to transmit the reversion from them, by descent, to any person who was not heir to the donor or settlor. Tit. 17.

5. D. Smith, in consideration of his marriage with Sarah Madey, in 1716, settled the premises in question to the use of himself and the said Sarah, during their natural lives, and the life of the survivor of them; remainder to the heirs of the body of the said Sarah by the said David; remainder to the said David, his heirs and assigns for ever. There was issue of the marriage one daughter, named Elizabeth, and no other child. Upon the death of the said Sarah, David Smith married a second wife; and by her had issue, Ann, the lessor of the plaintiff, and no other child. Elizabeth the daughter of the said David by Sarah his first wife, intermarried with John Waters, and upon that marriage, David Smith delivered up the possession of the premises to John Waters, but did not execute any conveyance thereof to him. In 1738 David Smith died, leaving issue only Elizabeth by his first wife, and Ann by his second wife; and about twelve months after, Elizabeth died, leaving issue one son, who was born after the death of David his grandfather, and died an infant, soon after the death of his mother. The said David Smith had no brother, but left a sister named Jane (married to one Gilbert) who was heir at law to Elizabeth the daughter of David Smith, by his first wife, and to her son; and upon the death of John Waters, Gilbert and his wife entered on the premises. Ann, the daughter of David Smith by his second wife, claimed the estate, as heir at law to her father; and brought an ejectment against Gilbert and his wife. Jenkins *v.* Prichard, 2 Wils. 45.

Serjeant Wilson reports the Court to have been of opinion that Ann had no title to the premises. But it is truly observed by Mr. Watkins, in his Essay on the Law of Descents, that 2d edit. 143. n. (g.)

the judgment is evidently mistated, or wrongly printed; that in a note of this case taken by Mr. Serjeant Hewit, afterwards Lord Chancellor of Ireland the adjudication is thus given:—"In this case it was clearly agreed, that by the settlement of 1716, David Smith was tenant for life; his wife was tenant in tail, with the reversion in David Smith: and thereupon this point was made, whether the reversion in fee descended upon the two daughters of David, *viz.* Elizabeth by his first wife, and Ann by his second wife, in such manner as that upon the determination of the estate tail which descended upon Elizabeth, and from her upon her son, and expired by his death without issue, it should go in moieties; *viz.* one moiety to Ann, and the other to the heirs of Elizabeth; or whether it should not go all to Ann as heir to her father, who was last actually seised of the reversion."

The judges were of opinion, "that though the reversion descended upon the two daughters of David on his death, yet they were not actually seised of that reversion during the continuance of the estate tail, but the same was expectant thereon; and as whoever takes by descent must take as heir to him who was last actually seised, therefore Ann took the reversion wholly as heir to her father. And as to this, 1 Inst. 14, 15. and Kellow v. Rowden, in Carthew and Shower, were held to be authorities in point."

Doe v. Hutton, 3 Bos. & Pul. Rep. 658.

Lord Alvanley has observed that the preceding case was mistated in Wilson; as all the reasoning shewed it must have been determined in favour of the lessors of the plaintiff.

Goodright v. Searle, Fearne Cont. Rem. 561. 6th ed. Goodtitle v. White. 15 East. 174.

6. [But now by the late statute 3 & 4 Will. 4. c. 106. in all cases of descents upon deaths after the 1st day of January 1834, the law of inheritance is the same with respect to estates in possession, remainder or reversion.

7. By the first section, the act applies to estates of inheritance for life or lives or other estates transmissible to heirs, and to any possibility, right or title of entry or action, and any other interest capable of being inherited, and whether the same estates, possibilities, rights, titles and interests, or any of them, shall be in possession, reversion, remainder or contingency.]

A right to a remainder, &c. goes to the half blood.

8. A right to an estate in remainder or reversion [even before the above act,] went to the half blood; for where a person having such a right died before the estate in remainder or rever-

sion fell into possession, he could not acquire such a seisin as to become the stock of an inheritance. Therefore his heir of the half blood, if he was heir to the donor or settlor of the remainder or reversion, became entitled to it.

9. Thus if there were a gift to baron and feme in special tail, remainder to the right heirs of the baron, and they had issue, the feme died, the baron took another feme, and had issue and died, and the eldest son entered and died without issue, the second son of the half blood should have the remainder; because the eldest son was not seised thereof in his demesne. Lord Coke has stated this case, and observed that the rule is, *possessio fratris de feodo simplici facit sororem esse hæredem*; and here the eldest son was not possessed of the fee simple, but of the estate tail. 1 Roll. Ab. 628. pl. 6. 1 Inst. 14 b.

10. So if land were given to J. for life, remainder to R. his son in tail, remainder to the right heirs of J.; and J. died, and R. entered as tenant in tail, and died without issue; T. the son and heir of J. of the half blood to R. should have the land by descent, and not the heir of R.; because R. was never seised in fee in demense. 1 Roll. Ab. 628. pl. 7.

11. So if a gift were made to a person in tail, remainder to his right heirs, and after the donee died, having issue a son by one venter, and a son by another venter, and the eldest son entered and died without issue, his brother of the half blood should inherit the remainder by descent, because the elder brother was never seised thereof in demesne. Idem, pl. 8.

12. So if the eldest son were seised in tail, with a remainder or reversion by descent to him, from his father in fee, and died without issue; his brother of the half blood should have the remainder or reversion by descent, because his brother was never seised thereof in demesne. Idem, pl. 9.

13. Lord Coke says, if a father make a lease for life, or a gift in tail, and dies, and the eldest son dies in the lifetime of the tenant for life, or tenant in tail; the younger son of the half blood shall inherit the reversion; because the tenant for life or tenant in tail was seised of the freehold, and the eldest son had nothing but the reversion expectant upon that freehold; therefore the younger son shall inherit the land, as heir to his father, who was last seised of the freehold. 1 Inst. 15 a.

14. Lord Coke has also observed, that although a rent had Idem, & n. 5.

[illegible] in a lease for life, and the eldest son had received it, yet it was holden by some that the younger brother should inherit; because the seisin of the rent was no actual seisin of the freehold of the land: but that 35 Ass. pl. 2. seemed to the contrary, because the rent issued out of the land, and was in lieu thereof. It is however said in Lord Hale's Notes, published by Mr. Hargrave, to have been adjudged in the case of Piper v. Masters, Trin. [illegible], that in such a case seisin of rent did not make a [illegible].

[illegible] 15. Although the eldest son entered on the death of his father, and got actual possession of the fee simple, yet if the widow of the father were endowed of a third part, and the eldest son died in the lifetime of the widow, the younger brother of the half blood would inherit the reversion of the third part, notwithstanding the elder brother's entry; because the actual seisin which he acquired thereby was defeated by the endowment.

[illegible] 16. Where there were two sons, or two daughters, by different venters, and a remainder or reversion expectant upon an estate for life was purchased by the father, who died in the lifetime of the tenant for life, and the eldest son or daughter also died in the lifetime of the tenant for life, the half blood should inherit; for in this case the claim was from the father.

1 Ves. 174. 17. In the case of Cunningham v. Moody, where a limitation was to husband and wife for their joint lives, remainder to the children of the marriage in tail, and for default of such issue, to the right heirs of the husband in fee, the husband had one daughter of the marriage mentioned in the settlement, and another daughter of a second marriage; and upon the death of the first daughter without issue, the question was whether her sister of the half blood was entitled to the reversion in fee. Lord Hardwicke held, that as the reversion which descended on the eldest sister was never clothed with possession, it would descend to the sister of the half blood.

Doe v. Hutton, 3 Bos. & Pul. 643.

An act of ownership operates as a seisin.

18. Where the person entitled to a remainder or reversion exercised an act of ownership over it, by granting it for life, or in tail; this was deemed equivalent to an actual seisin of an estate, which was capable of being reduced into possession by entry; and would make the person exercising it a new stock or root of inheritance. For an entry being impossible, the alienation of the remainder or reversion for a certain time was allowed to be

sufficient to change the descent; because such alienation being formerly always attended with attornment was deemed equal in point of notoriety to an entry on a descent. [But now in all descents occurring on deaths after the 1st day of January, 1834, the heirship is traced from the person last entitled, or who had a right to the estate, whether he did or did not obtain possession, or the receipt of the rents and profits; and whether the estate is in possession, remainder, reversion, or in contingency. 3 & 4 Will. 4. c. 106. s. 1.

19. In reference to acts of ownership by the person entitled to a remainder or reversion,] Lord Coke, after stating the case of a son's endowing his father's widow, says—"But if the eldest son had made a lease for life, and the lessee had endowed the wife of his father, and tenant in dower had died, the daughter should have had the reversion, because the reversion was changed and altered by the lease for life; and the reversion is now expectant on a new estate for life." In another place he says—"for many times the change of the freehold makes an alteration or change of the reversion." This doctrine has been confirmed by Lord Hardwicke in the following case. 1 Inst. 15 a. 8 Rep. 35 b. Id. 191 b.

20. A. being tenant for life, remainder to trustees to preserve contingent remainders, remainder to his first and other sons in tail male, remainder to the heirs of his own body, remainder to the right heirs of his father, had a sister of the half blood, and also a sister of the whole blood. A. conveyed the estate to B. by lease and release, in trust for payment of debts, and levied a fine thereof. Stringer v. New 9 Mod. 363.

Lord Hardwicke said, the question was whether A. had made any alteration as to the descent of the reversion in fee. If he had not, it would descend to the sister of the half blood, who was the elder daughter, and equally heir to the father with the other daughter. But if he had altered it, and given it to himself, it would descend to the sister of the whole blood, who claimed as heir to her brother, who was last actually seised, and who would be entitled under that known rule of law, that *possessio fratris de feodo simplici facit sororem esse hæredem.* But then it was certain that must be an actual possession; so that it was argued in this case that this being an estate for life in A. with a remainder in tail, and a reversion in fee expectant; this was not such a possession as would entitle the younger daughter to take under a *possessio fratris.*

What was insisted upon on the other hand, in order to have altered the course of descent, and given it to the heirs of A. instead of the father, was, that A. had made a lease and release, and thereby conveyed the estate to B., in trust for the payment of debts, &c. and levied a fine thereof; but had not suffered a recovery. And the question was, whether this fine had changed the reversion in fee, and thereby altered the descent.

He was of opinion that it did alter the reversion; and therefore the estate would go to the right heirs of A.; and founded his opinion on the two passages stated in a former section from Coke on Littleton, 15 *a*, and 191 *b.*; from which it appeared, that in consequence of such change in the reversion, it should descend to the heir of the son; and therefore entitle the younger sister of the whole blood to claim as heir to him by a *possessio fratris*. The conveyance was by lease and release to B., to pay debts, &c.; and surely this was a great alteration, for this amounted to a grant of his estate for life. It likewise passed the reversion in fee; for as he was right heir of his father, he had a reversion to grant, though it would descend to the right heirs of the father, without any such alteration; and though the estate was subject to redemption on payment of the debts, &c. yet it would follow the heirs of the son, because the son had changed it, and made it his own by a plain alteration.

Ante, s. 17.

He then said he should consider what would be the effect of the fine, supposing the lease and release out of the case. That fine would certainly have barred the remainder in tail to himself, for he was seised for life, with remainder to the heirs of his own body; so that the fine barred the estate, and would have amounted to a grant of the reversion in fee, if to a stranger. Now this reversion in fee, instead of being expectant on the estate tail, as it originally was, did now depend on an estate in contingency. Therefore on this case, whether the reversion being thus changed, should alter the descent of it, so as to go to the heirs of the son, he was clearly of opinion that it was literally within what was laid down in Co. Lit. 191 *b.* that if the elder brother change the freehold, it shall alter the reversion likewise, and shall cause a *possessio fratris*. In this case both the conveyances changed the reversion, and therefore the estate descended to the heir of the whole blood, to the brother.

Vide Tit. 35.

CHAP. V.

Descent by Statute and Custom.

SECT. 1. *Descent of Estates Tail.*
6. *Go to the Half Blood.*
7. *No Corruption of Blood.*
10. *Customary Descents.*
11. *Gavelkind.*
16. *Borough English.*
20. *Customary Descents not altered by Limitation.*
21. *Copyhold Descents.*
27. *The Half Blood excluded.*
32. *Construed strictly.*

SECTION I.

BESIDES the descent of lands in fee simple, there are two other modes of descent, of which it will be proper to give an account. (*a*) The first of these is the descent of estates tail, which is regulated by the statute *De Donis Conditionalibus*; and is therefore called descent by statute. Descent of estates tail.

2. The descent of an estate tail resembles that of a *feudum novum*; for the person to whom an estate tail is originally given or limited is the first purchaser of it; and none but those who are lineally descended from him can derive a title to it by descent. (*b*)

3. In some cases the descent of an estate tail is not only confined to the lineal descendants of the first purchaser, or donee; but is restrained to those of the male sex, as in the case of estates in tail male; or to those who are born of a particular woman, as in the case of estates in tail male special. But in all cases of intail the right of primogeniture takes place; and where females are not excluded, they all take in coparcenary, in the same manner as in the case of a descent in fee simple. Tit. 35. c. 9. Tit. 2. c. 1.

4. The descent of an estate tail may be defeated by the subse- 1 Inst. 46 a. 7 Rep. 8 b.

(*a*) The descent of dignities has been already discussed in Title XXVI.; and the descent of estates held by prescription will be noticed in Title XXXI.

(*b*) The descent of an estate limited to the heirs of the body of A. will be stated in Title XXXII. c. 22.—*Note to former edition.*

quent birth of a nearer heir in tail. Thus, if a tenant in tail general dies, leaving a daughter, and after his wife is delivered of a son, such son may enter upon his sister.

Ratcliff's case, 3 Rep. 41 b. 2 Ves. 364.

5. The maxim that *seisina facit stipitem* does not take place in the descent of estates tail: it being only necessary, in deriving a title to an estate of this kind by descent, to deduce the pedigree from the first purchaser, and to shew that the claimant is heir to him; for the issue in tail claim *per formam doni;* that is, they are as much within the view and intention of the donor, and as personally and precisely described in the gift, as any of their ancestors. This doctrine will be more fully considered when we come to explain the effect of a fine in barring the collateral heirs of a tenant in tail.

Tit. 35. c. 9.

Go to the half blood.

6. The exclusion of the half blood does not take place in the descent of estates tail; because the descent from the first purchaser, or original donee of the estate, must be strictly proved; and when the lineage is thus made out, there is no need of this auxiliary evidence. Lord Coke says, the issue in tail is ever of the whole blood to the donee. And in a modern case Lord Kenyon observed, that in the case of estates tail, the half blood coming within the description of the entail, may inherit as effectually as the whole: there the rule of *possessio fratris* does not apply.

1 Inst. 15 b. 3 Rep. 41 b. 8 Ter. Rep. 213.

No corruption of blood. Tit. 2. c. 2. 3 Rep. 10. Bro. Ab. tit. *Nosme*, pl. 1.

7. Although estates tail are made forfeitable by attainder for treason, yet it was laid down by the Court of Exchequer in Dowtie's case, reported by Lord Coke,—"That neither the act nor the attainder makes any corruption of blood, as to the descent of land in tail; for Popham, Attorney-General, said, that so it was agreed in the case of Lord Lumley, that where there was grandfather, father and son, and the grandfather was tenant in tail, and the father was attainted of high treason, and died in the life of the grandfather, and afterwards the grandfather died, that the land should descend to the son, notwithstanding the attainder of the father; which case was affirmed for good law by the whole Court. For the father had not the land, neither in possession nor in use, in which two cases the act of 26 Hen. 8. gave the forfeiture only; and his attainder is not any corruption of blood for the land intailed."

Mantell v. Mantell.

8. The same point was determined by the Court of Exchequer Chamber, in a case reported in Croke, Eliz. 28.; and was ad-

mitted to be good law in 8 Jac. 1. by the two chief justices, the chief baron, and the court of wards. Digby's case, 8 Rep. 165 b.

9. The late Mr. Yorke, in his Tract on the Law of Forfeiture, after stating Lumley's case, proceeds in these words:—"The reason is obvious, because the issue in tail claims *per formam doni*, that is, he is as much within the view and intention of the gift or settlement, and as personally and precisely described in it, as his ancestor; but this is not all; the forfeiture of estates tail came in by the construction of the statute of the 28 Hen. 8. The judges resolved that the general words of those statutes comprehended these estates. But then such laws being of a penal kind, though they are to be construed so as to attain their full effect, yet they are to be construed strictly; and however they might extend to make estates tail liable to forfeiture where they are actually in the offender's possession, and consequently in his power to alienate; they could by no rule of construction be extended to bring consequential disabilities on the heir, where the estates have not been in the offender's possession." Pa. 82, 4th ed. Airlie case, Tit. 26. c. 2.

10. There are some other modes of descent, which are derived from the peculiar customs of particular places, and which differ in many respects from descents by common law: of these, the principal are, the descent of lands held in gavelkind, in borough English, and by copy of court roll. (*a*) Customary descents.

11. The descent of lands held in gavelkind, in the right line, is among all the sons, as coparceners; and in default of sons, among all the daughters, in the same manner: but though females, claiming in their own right, are postponed to males, yet they may inherit together with males by representation; for the right of representation takes place in customary descents, as well as in descents at common law. If, therefore, a man has three sons, and purchases lands held in gavelkind, and one of the sons dies in the lifetime of his father, leaving a daughter, she will inherit the part of her father: yet she is not within the words of the custom, *inter hæredes masculos partibilis;* for she is no male, but the daughter of a male, coming in his stead by representation. Gavelkind. Lit. ss. 210. 265. Rob. Gav. 90.

(*a*) [The alterations made in the law of descents by the recent statute, 3 & 4 Will. 4. c. 106. apply to lands of gavelkind, borough English, copyhold, and any other tenure, s. 1., and which have been noticed in the preceding chapters of the title Descent, and to which the reader is referred.]

I Inst. 100 a. Rob. Gav. 92.

12. The partible quality of lands held in gavelkind is not confined to the right line, but is the same in the collateral one. For it has been resolved, that where one brother dies without issue, all the other brothers shall inherit from him; and in default of brothers, their respective issue shall take, *jure representationis*. But where the nephews succeed with an uncle, the descent is *per stirpes*, and not *in capita*: and so, from the nature of the thing, it must be, where the sons of several brothers succeed, no uncle surviving; for though in equal degree, they stand in the place of their respective fathers.

Lit. s. 265. Dyer, 179 b. Rob. Gav. 94.

13. Although an estate tail is a kind of inheritance introduced by the statute *De Donis Conditionalibus*, yet this partible quality extends to it; for if a person dies seised in tail of lands held in gavelkind, all his sons shall inherit together, as heirs of his body.

Id. 97.

14. Descendible freeholds are also partible, where the lands are held in gavelkind: as if a lease be made of lands of this kind to a man and his heirs, during the life of A., and the lessee dies, living A., the lands shall descend to all his sons as special occupants.

Tit 3. c. 1.

Rob. Gav. 99.

15. The exclusion of the half blood takes place in lands held in gavelkind, [in descents occurring on deaths before the 1st day of January 1834; but in descents falling after that time, the law which excludes the half blood is now altered by the late statute 3 & 4 Will. 4. c. 106. s. 9. which applies to lands of every tenure, s. 1.]

Borough English. 7 Vin. Ab. 560.

16. With respect to lands held in borough English, Littleton says, s. 165., some boroughs have a custom, that if a man has issue many sons, and dies, the youngest shall inherit all the tenements which were his father's within the same borough, by force of the custom.

1 Inst. 110 b.

17. This custom extends to estates tail, and also to descendible freeholds. Thus Lord Coke says, — "If lands, of the nature of borough English be letten to a man and his heirs, during the life of J. S., and the lessee dieth, the youngest son shall enjoy it."

Clements *v.* Scudamore, infra, s. 25.

18. The right of representation takes place in the descent of lands held in borough English: therefore, if the youngest son dies in the lifetime of his father, leaving a daughter, she will inherit the lands.

19. The custom of borough English is however lineal descents, and does not extend to collateral where lands held in borough English descended t son, and he died without issue, it was resolved tha go to the younger brother; for the custom did not take place in the descent between brothers, but the eldest brother inherited. Lord Coke has however said, that by some customs the youngest brother shall inherit: but this extension of borough English to the collateral line must be specially pleaded. 1 Inst. 110 b. n. 3.

20. These customary descents in gavelkind and borough English cannot be altered by any limitation of the parties: therefore, where A. seised in fee of lands held in borough English, made a feoffment to the use of himself and the heirs male of his body, according to the course of the common law, the words "according to the course of the common law" were held void; for customs which go with the land, as this one, and gavelkind, and fix and order the descent of inheritances, can only be altered by parliament. Customary descents not altered by limitation. Jenk. Cent. 5. Ca. 70. Dyer, 179 b.

21. Estates held by copy of court roll are in general descendible in the same manner as estates held in socage; though in some manors a different mode of descent is established by custom: but the ceremonies of the feudal law upon descents are still followed: for when a copyholder dies, his death must be presented by the homage, at the next court, and proclamation made for the heir to claim, who must come in within a limited time, and be admitted; else he will forfeit the estate. Copyhold descents. Tit. 10. c. 3. Id. c. 5.

22. Lord Coke says, the heir is tenant by copy immediately on the death of his ancestor; not to all intents and purposes, for peradventure he cannot be sworn of the homage before admittance, neither can he maintain a plaint in the lord's court before, because till then he is not complete tenant to the lord, no farther forth than the lord pleaseth to allow him for his tenant: so that to all intents and purposes the heir, till admittance, is not complete tenant; yet to most intents, especially as to strangers, the law takes notice of him, as of a perfect tenant of the land, instantly upon the death of his ancestor; for he may enter into the land before admittance, take the profits, punish any trespass done upon the ground, surrender into the hands of the lord, to whose use he pleaseth, satifying the lord his fine, due upon the Cop. s. 41. 4 Rep. 23 b.

descent; and by estoppel he may prejudice himself of his inheritance.

Gilb. Ten. 192. 2 P. Wms. 15. 1 Atk. 449.

23. The heir of a copyholder is not however compellable to accept the inheritance. But if he does not come in and accept, the lord may seise the copyhold to his own use.

24. The right of representation takes place in the descent of copyholds; for whenever the custom gives any person the heirship, the law will give all necessary rights and incidents.

Clements v. Scudamore, 2 Ld. Raym. 1024. 1 P. Wms. 63.

25. J. S. having issue five sons, the youngest died in the lifetime of his father, leaving issue a daughter. Afterwards J. S. purchased the lands in question, which were copyhold. The jury found, that by the custom these lands were descendible to the youngest son and his heirs. The father died; and the question was, whether the lands descended to the daughter of the youngest son, or to the eldest son.

Godfrey v. Bullock, 1 Roll. Ab. 623.

Lord Holt. — "We are all of opinion that the daughter ought to have the lands *jure representationis*. Wherever this custom hath obtained, the youngest son is thereby placed in the room of the eldest son, who inherits by the common law; and there is no other difference in the course of descent, but that the custom prefers the youngest son, and the common law the eldest son; and therefore as at the common law the issue of the eldest son, female as well as male, do inherit *jure representationis*, before the other brothers, so, by the same reason, where this custom has transferred the right of descent from the eldest son to the youngest, it shall also carry it to the daughter of the youngest son, by like representation; and there is no reason to make any difference between a descent by this custom, and at common law; though Lord Coke is of a different opinion."

Co. Cop. s. 50. Taverner v. Cromwell. 3 Leon. 109.

26. Where a copyhold estate has been derived from the mother's side, it will go to the heirs on the part of the mother; unless the copyholder departs with it, and acquires a new estate by purchase. And it has been resolved, that a surrender and resurrender of a copyhold, as also a recovery suffered in the lord's court, will alter the descent.

4 Rep. 27. Tit. 37. cc. 1. & 2.

The half blood excluded. 3 & 4 Will. 4. c. 106. s. 9.

27. The rule respecting the exclusion of the half blood takes place in copyholds, [in descents occurring upon deaths previously to the 1st day of January 1834, but not since.] And the estate which the heir might acquire by entry, before admittance, was sufficient to establish a *possessio fratris*. Thus if a copyholder

Co. Cop. s. 41. 4 Rep. 22 a. Gilb. Ten. 158.

in fee has issue a son and a daughter by one venter, and a son by another venter, and dies, the son by the first venter enters into the land, but dies before admittance, the daughter shall inherit as heir to her brother; not the son by the second venter, as heir to his father.

28. A man, tenant in fee of a copyhold, had issue two daughters by different venters, and died seised thereof. The daughters entered, and took the profits for several years, without any admittance. The eldest daughter died without issue; afterwards the youngest daughter was admitted to the whole, as sole heir to her father. The question was, whether the next heir of the whole blood to the eldest daughter should have the moiety. By the opinion of Walsh and Dyer, justices, the possession aforesaid, without admittance, was sufficient in law to make the collateral heir inheritable; and it was ordered by the Lord Keeper accordingly. Anon. Dyer, 291 a. pl. 69.

29. A copyholder had issue a daughter by one venter, and a son by another, and died, the son within age. The lord of the manor committed the custody of the land during the nonage, to the mother of the son, who entered; afterwards the son within age died, without any admittance of him as heir. The daughter, who was his sister by the half blood, prayed to be admitted: but by the opinion of Catlyn and Dyer, to whom the question was referred, she should not be admitted; because the possession of the mother as guardian, gave actual possession to the son. Id. 292 a. Co. Cop. s. 41.

30. In a modern case, the entry of a widow, as guardian to her son, was held to have the effect of obtaining a possession for the son, sufficient to exclude the half blood. Forder v. Wade, 4 Bro. C.C. 521.

31. It is said by Lord Chief Baron Gilbert, that where a copyholder by licence made a lease for years, the lessee entered, and the lessor died, having issue a son and a daughter by one venter, and a son by another; then the eldest son died. It was adjudged that the daughter of the whole blood should inherit, because the possession of the lessee for years was the possession of the elder brother, who might have possession before admittance; for in that case he was not admitted; and if it was reasonable in such a case at common law, to keep the inheritance out of the half blood, so it was in copyholds. Ten. 158.

32. Where the customary descent is different from that by Construed strictly.

the common law, it is construed strictly; for the law does not take notice of any special customs of this kind, except gavelkind and borough English, unless they are expressly pleaded, and then the courts will not carry them farther than the words of the custom.

Paine v. Herbert, 2 Keb. 158. 2 Ld. Raym. 1025.

33. By the custom of a manor, the copyhold lands of every tenant dying *seised*, were descendible to the youngest son. A surrender was made to the use of B. and his heirs, who died before admittance. If B. had been admitted, it was agreed that after his death the youngest son should have inherited; but dying before admittance, the question was between the eldest and youngest son of B. who should have the lands. Adjudged, that the eldest son should in this case inherit, because of the straitness of the custom; there never having been any seisin in the ancestor.

Bridg. R. 18.

Rapley v. Chaplin, Godb. 166. 4 Leon. 242. 1 Roll. Ab. 624. pl. 2.

34. If a custom be alleged that the eldest daughter shall solely inherit, the eldest sister shall not inherit by force of that custom. So if the custom be that the eldest daughter and the eldest sister shall inherit, the eldest aunt shall not inherit. So if the custom be that the youngest son shall inherit, the younger brother shall not inherit.

Reve v. Malster, Cro. Car. 410.

35. George Reve, copyholder in fee of lands being parcel of the manor of Hoo, where the custom was, that the land was of the nature of borough English, descendible to the youngest son, had issue three sons, William, George, and Charles, and surrendered his copyhold to the use of himself and Ann his wife, and his heirs, to which they were admitted accordingly. Afterwards George the father died, seised of the reversion, which descended to the said Charles his youngest son, who died without issue. The question was, whether the eldest or second son should inherit from Charles. It was resolved that George the second son could not have it as brother and heir to Charles by the custom, for the custom could extend to the youngest son only, and not amongst the brothers, where no such custom was found: and without a special custom found, that it should descend to the youngest brother, the law would not admit it; because customs ought always to be taken strictly.

Denn v. Spray, 1 Term R. 466.

36. Joseph Stanley being seised of a copyhold estate, died intestate, and without issue; leaving one niece, Ann Wragg, and the representatives of two other nieces, who died before him; Ann Goodwin, only child of Mary his second niece, and Joseph

Spray, the eldest son of Elizabeth, his eldest niece; who were the daughters of Thomas Stanley, who was the elder brother of Joseph.

A parchment writing was produced upon the trial by the steward, as the customary of the manor, which was admitted as evidence, it being an ancient writing without date, found among the court-rolls, and delivered down from steward to steward, and stated to be *ex assensu omnium tenentium;* in which were the following articles respecting descents:—*Si aliquis tenens hujus manerii obierit, filius suus primogenitus et legitimè procreatus habeat hereditamenta; et si contingat alicui quod non habeat filium, filia sua antenata habeat hæreditatem suam absque partitione.* It appeared from the court books that there were several entries where the eldest daughter, and others where the eldest sister, had been admitted as heir; but it did not appear that the eldest niece had ever been admitted as heir.

The question was, whether Joseph Spray the defendant, who was in possession as the representative of the eldest niece, should inherit; or whether the copyhold should descend according to the rules of the common law, and be divided among them.

The Court said, that as there was no proof in the court-rolls of the course of succession in the collateral line, further than the case of a sister, it followed that this copyhold did not go to the youngest niece.

Another argument arose from the particular penning of the custom, which said,—*Si aliquis tenens hujus manerii obierit.* Now Thomas Stanley, the grandfather of Joseph Spray, the defendant, never was a *tenens manerii;* therefore the custom, as to the course of descent, never attached upon him.

37. In ejectment to recover certain customary lands, the lessor of the plaintiff claimed under a custom of the manor, for the youngest kinsman or kinswoman to inherit, in default of brothers and sisters of the person last seised. The plaintiff offered in evidence an entry in the court-rolls of the manor, stating what the custom was: the defendant's counsel objected that such evidence of the custom ought not to be received, until instances had been proved of such a mode of descent having taken place. Roe v. Parker, 5 Term R. 26.

The jury found a verdict for the plaintiff. Upon a motion for a new trial, on the ground that the evidence of the presentment of

such a custom on the court-rolls, by the homage, was not of itself sufficient to establish the custom, inasmuch as no instance was produced of its being put in use; which, it was contended, was the true principle on which the determination of Denn *v.* Spray was founded.

Ante, s. 36.

Lord Kenyon,—"I admit that the custom of one manor cannot be extended by analogy to another; but the mode of descent, under which a party claims must be established by proof;—and the question here is, whether or not there were any evidence of the custom upon which the plaintiff's claim was founded? The custom is clearly defined in the paper writing, produced from the court-rolls; and without referring to the strict rules of law, let us consider the authenticity of this document on principles of plain common sense. Near a century and a half ago, the homage (the tenants holding under the lord of the manor,) being convened together *eo nomine* as the homage not for the purpose of extending their claims, either against the lord or strangers; but in order to ascertain those rights which were their own, in common with the rest of the tenants, and being possessed of all that information which either tradition or their own personal observations could furnish, proceeded to describe the several customs which regulated the descent of the different species of tenure within this manor. Now, can it be supposed that these persons, acting under the sanction of an oath, could for no other purpose whatever, give a false representation of these customs? Or is it not more probable that their account was the true one? Common sense and common observation would induce us to believe the latter.

Doe *v.* Sisson, 12 East. 62.

"The argument against the verdict seems to admit, that this document was a degree of evidence when it was produced to the jury; and, if it were admissible in evidence, it not being opposed by any other species of evidence, and the jury having given credit to it, it puts an end to the question. And that this was admissible cannot be doubted: for tradition and the received opinion are the evidence of the *lex loci*.

"A distinction indeed prevails between a prescription, as applied to a particular tenement, and a custom affecting the whole district; and the latter has gone so far, that the custom of one manor has been given in evidence to shew the custom of another, when they are both governed by the border law. Now,

here was full proof of a tradition respecting the custom of descent in this manor; it was the solemn opinion of twenty-four homagers, who are the constitutional judges of that court, delivered on an occasion when they were discussing the interests of all the tenants of the manor. I cannot distinguish this from the instance of a terrier, which is certainly evidence. The case of Denn *v.* Spray is distinguishable from the present. Every thing, that was said by the Court in giving judgment, must be understood *secundum subjectam materiem.* That case first decided that such an instrument as the present is admissible; and then that part of it, which said that lands were not partible, either between males or females, in general terms, was to be explained by the custom, as it had existed in point of fact, which did not extend to nieces. And if that decision go farther, and determine that such a document is not admissible in evidence, unless instances in fact be previously proved to warrant the production of it, I must beg leave to dissent from it. In this case, supposing the defendant had demurred to this evidence, I think the Court must have drawn the same conclusion from it, which the jury have drawn; and therefore, on the law of the case, I think that the rule for a new trial should be discharged."

Ante, s. 36.

TITLE XXX.

ESCHEAT.

SECT. 1. *Title by Purchase.*
6. *Escheat.*
10. *For Default of Heirs.*
11. *For Corruption of Blood.*
14. *No Escheat where there is a Tenant.*
17. *Any Alienation prevents an Escheat.*
21. *What things Escheat.*
25. *A Trust Estate does not Escheat.*
28. *Nor an Equity of Redemption.*
SECT. 29. *Nor Money to be laid out in Land.*
30. *To whom Lands Escheat.*
32. *The Lord by Escheat may distrain for Rent.*
33. *Entitled to a Term to Attend.*
35. *And to all Charters.*
36. *Is subject to Incumbrances.*
38. *Was not bound to execute an Use.*
39. *Is not subject to a Trust.*
45. *Office of Escheator.*

SECTION I.

Title by purchase.

OF the two modes of acquiring a title to real property, the first, namely, descent, has been treated of in the preceding Title. We now therefore come to the second, that is, purchase, which is thus defined by Littleton, s. 12: — "Purchase is called the possession of lands or tenements that a man hath by his deed or agreement, unto which possession he cometh, not by title of descent from any of his ancestors or cousins, but by his own deed.

1 Inst. 18 b.

2. Lord Coke in his comment on this section, observes that a purchase is always intended by title, and most properly by some kind of conveyance, either for money, or for some other consideration, or freely of gift; for that is, in law, also a purchase. And

Plowd. 47.

accordingly the makers of the statute 1 Hen. 5. c. 3. speak of those who have lands or tenements by purchase, or descent of inheritance.

3. The feudal writers call purchase *conquestus* or *conquisitio*, both denoting any means of acquiring an estate out of the com-

mon course of inheritance. The Norman jurists styled the first purchaser, or person who first acquired the estate, the *conquereur;* and Glanville uses the word *questus* to denote the property which a person has acquired by his own act, and not by descent. Lib. 7. c. 1.

4. The difference between the acquisition of an estate by descent and by purchase consists principally in two points. 1. That by purchase the estate acquires a new inheritable quality, and is descendible to the owner's blood in general, as a feud of indefinite antiquity. 2. That an estate taken by purchase will not make the person who acquires it answerable for the acts of his ancestors, as an estate by descent will.

5. Sir W. Blackstone has enumerated the following modes of acquiring an estate,—by purchase, escheat, occupancy, prescription, forfeiture, and alienation. Of these we shall only treat of escheat, prescription, and alienation; occupancy having been already noticed in Title III. c. 1., and forfeiture being noticed in that and several other Titles.

6. It has been stated that, by the feudal law, when the tenant died without heirs, the lord became entitled to the feud. This law, which was introduced here by the Normans, is founded on the principle that the blood of the person last seised in fee simple is by some means or other utterly extinct and gone; and since none can inherit his estate but such as are of his blood and consanguinity, it follows as a regular consequence that the inheritance itself must fail; the land must become what the feudal writers call *feodum apertum*, and result back to the lord of the fee, from whom or from whose ancestor it was originally derived. Escheat. Diss. c. 1. 2 Inst. 64. Wright's Ten. 115. See Doe v. Redfern, 12 East. 96.

7. This mode of acquiring an estate is called an escheat, which Lord Coke says is a word of art, derived from the French word *eschier, quod est accidere;* for an escheat is a casual profit, *quod accidit domino ex eventu et ex insperato*, which happens to the lord by chance, and unlooked for. An escheat is therefore, in fact, a species of reversion, and is so called and treated by Bracton. When a power of alienation was introduced, the change of the tenant changed the chance of the escheat, but did not destroy it; and when a general liberty of alienation was allowed, without the consent of the lord, this right became a sort of caducary succession, the lord taking as *ultimus hæres*. 1 Inst. 13 a. 92 b. — 23 a.

N. B. 142.

8. Fitzherbert says, a writ of escheat (*a*) lies where a tenant in fee simple of any lands or tenements, which he holds of another, dies seised without any heir general or special, the lord shall have a writ of escheat against him who is tenant of the lands, after the death of his tenant, and shall recover the land; because he shall have the same in lieu of his services.

1 Inst. 18 b. s 2.

9. Mr. Hargrave has justly observed that an escheat, in appearance, participates in the nature both of a purchase, and of a descent. Of the former, because some act of the lord is requisite to perfect his title; and the actual possession of the land cannot be gained till he enters, or brings his writ of escheat. Of the latter because it follows the nature of a seignory, and is inheritable by the same person.

For default of heirs.

10. An escheat may happen in two ways. 1. *Per defectum sanguinis*, that is, for default of heirs; 2. *per delictum tenentis*, that is, for crime. Escheats arising from default of heirs, whereby the descent is at an end, can only be in the three following cases: 1. Where the tenant dies without any relations on the part of any of his ancestors. 2. Where he dies without any relations on the part of those ancestors from whom the estate descended. And 3. Where he dies without any relations of the whole blood, [in cases of descents occurring upon deaths before the 1st day of January, 1834.] For in all those cases there is no one capable of inheriting from him.

[But by the recent statute 3 & 4 Will 4. c. 106. s. 9. the half blood are admitted to the inheritance in cases of descents happening after the above period; so that escheat cannot happen on failure of the whole blood, where there are relations of the half blood capable of inheriting under the provisions of the above statute.]

For corruption of blood.

11. Escheats *propter delictum tenentis* arise in consequence of a person's being attainted of treason or felony; by which he becomes incapable of inheriting from any of his relations, or of

1 Inst. 13 a.

transmitting any thing by heirship. So that if any one dies seised in fee of lands, whose heir at law is attainted, the lands escheat: and where a person attainted dies seised in fee of lands,

See stat. 3 & 4 Will. 4. c. 106. s. 10. Sup. Tit. 29. c. 2. s. 35.

as he cannot have an heir, they will also escheat, unless forfeited; where that happens, they are interrupted in their passage by the

(*a*) [Writs of escheat abolished after 1st June, 1835, by stat. 3 & 4 Will. 4. c. 27. ss. 36, 37. See also s. 38.]

Crown, in the case of treason for ever, in that of felony, for a year and a day; after which they escheat to the lord of whom they are held. [But by the statute 54 Geo. 3. c. 145. it is enacted that no attainder for felony except for high treason, petit treason, and murder, or for abetting the same shall disinherit any heir, nor prejudice the right or title of any person other than that of the offender during his own life.]

12. There is one case in which lands are not liable to escheat; for if an estate held of J. S. be given to a dean and chapter, or to a mayor and commonalty, and to their successors, and such corporation is dissolved, the land shall not escheat to the lord, but shall revert to the donor. Lord Coke says, the reason of this diversity is, that in the case of a body politic, the fee simple is vested in them in their political capacity; therefore, the law annexes a condition to every such gift, that if such body politic be dissolved, the donor shall re-enter, for that the cause of the gift faileth. But no such condition is annexed to an estate in fee simple, vested in any man in his natural capacity; except in cases where the donor reserves a tenure, and then the law implies a condition by way of escheat.

13. It is however laid down in 37 Eliz. that where land, rent, &c. is granted to a corporation and their successors, if the corporation grants them over, and is dissolved, they shall not revert to the grantor. Southwell v. Wade, 2 Roll. Ab. 65. Poph. 91. Godb. 211.

14. As the lord's right to an escheat arises solely from the want of a tenant to do the services; it follows, that whenever there is a tenant, the lord cannot claim the lands by escheat. Thus Littleton says, s. 390, if there be lord and tenant, and the tenant be disseised, and the disseisor alien to another in fee, and the alienee die without issue, and the lord enters, as in his escheat; the disseisee may enter upon the lord, because the lord does not come to the land but by escheat. No escheat where there is a tenant. Gilb. Ten. 25.

Mr. Butler has observed on this passage, that when the lord comes to the land by escheat, the law only casts the freehold on him for want of a tenant. The disseisee, notwithstanding the disseisin, continues the rightful tenant; and as by his entry he fills the possession, the lord's title, which was good only while a tenant was wanting, must necessarily be at an end. 1 Inst. 240 a. n.

15. Fitzherbert says, if the tenant be disseised, and afterwards die without heir, it seemeth the lord shall have a writ of escheat, N. B. 144.

1 Inst. 268 a. because the tenant died in the homage. Lord Coke observes, that if the disseisor dies seised, and the disseisee dies without heir, and afterwards the lord accepts rent from the heir or feoffee of the disseisor, this shall bar him of his escheat; because they are in by title. For if the disseisor had made a feoffment in fee, or died seised, and after the disseisee died without heir, there would be no escheat; because the lord had a tenant in by title.

N. B. 144. 16. It is, however, laid down by Fitzherbert, that where a man had a title to a writ of escheat, if he accepted homage of the tenant, he should not have the writ against him, because he had accepted him as his tenant. So if he accepted fealty of him. But receipt of rent would not bar a writ of escheat.

Any alienation prevents an escheat. 17. It follows from the principles stated in s. 14, that any actual alienation by the tenant will bar the lord of his escheat. But a mere contract for the sale of lands will not bar the lord; as will be shewn hereafter.

4 Rep. 124 a. 8 —— 44 a. Tit. 32. c. 4. 18. If an infant makes a feoffment in person, and dies without heir, the land shall not escheat; otherwise, if it was made by letter of attorney. For the lord by escheat being only a privy in law, cannot take advantage of infancy; because he is a stranger to the infant. It is the same of an idiot or lunatic.

1 Inst. 236 a. 19. A devise, though it only takes effect at the moment of the testator's death, will prevent an escheat. And, in a note of Lord Nottingham's to the first Institute, it is said, that where a woman, seised of lands in London, devised them to be sold by her executors, and died without an heir, the devise prevented the escheat, which the King pretended to have; and the executors might enter and sell; therefore more than a bare authority passed. Yet in 1651, on evidence at the bar, this case being stated, Lord C. J. Rolle doubted of the opinion; because, he said, it was only a descent according to the words of Littleton: and it appeared to him, that when lands were devised to be sold by executors, there no interest passed.

1 Roll. R. 214. 3 Bulst. 43. Godb. 411.

Reve v. Att.-Gen. MS. R. 2 Atk. 223. 20. A man devised his estate to his wife for life; and that, after her death, it should be sold by A., and the money to be divided amongst the plaintiffs. The testator died without heir; before any sale A. died also. It not appearing that the land was held of any mesne lord, the plaintiffs brought their bill against the Attorney-General, praying to have the will established, and

to hold and enjoy against the Crown, or to have the lands sold pursuant to the will.

Lord Hardwicke said, if he could relieve the plaintiffs, he would. That he thought, at first, this was a bill brought to prove a will, by which the lands themselves were devised to somebody: if so, he would have thought such a bill proper; would have declared the will to be well proved; and decreed the devisee to sell, without any occasion of making a decree against the Crown. But here was no devise of the land, only a power to sell. If A. had lived, as he had only a power, and no interest in himself, none could arise from him, but from the testator; and he, as well as the testator, being dead, there was none to make a decree against. If any thing of the sort that was prayed for could be done, it must be in the Court of Exchequer, which was a court of revenue, and the proceedings in a petition of right, though called a petition, are as much a legal proceeding as by original writ.

Suppose this land had been seised and put in charge,—could he make any decree relating to it?—None. But the Court of Exchequer could. He could neither decree the Crown to sell, nor the plaintiff to hold and enjoy against the Crown. The bill was dismissed.

What things escheat.

21. All lands and tenements held in socage, whether of the King or of a subject, are liable to escheat. But it follows, from the nature of an escheat, that it must be of the entire fee; therefore, an estate tail does not escheat, but goes to the person in reversion, unless the tenant in tail has also the reversion in fee in him; for in that case the whole estate will escheat. Fitz. N.B. 144.

Rob. Gav. 226.

22. Lands held in gavelkind do not escheat upon conviction and execution for felony: but if a tenant in gavelkind, being indicted for felony, absent himself, and is outlawed after proclamation made for him in the county, his heir shall reap no benefit by the custom, but the lands shall escheat to the lord.

Co. Cop. s. 28. 2 Ves. jun. 187.

23. Copyholds are subject to escheat: but before the lord of the manor can enter on the lands, the homage must present the death of the tenant without heirs; and proclamations must be made, to give notice that if any person can prove himself heir to the last tenant, he shall be admitted.

24. No species of real property is, however, subject to escheat, but what lies in tenure; for escheat is a consequence and fruit of tenure. Thus, if a person seised in fee of a rent-charge, right

3 Inst. 21. Hard. 496.

of common, free warren, or any kind of inheritance that is not holden, was attainted of felony [before the 54 Geo. 3. c. 145.] the King should have the profits of them during the life of such person: but after his decease, as they could not descend to his heirs, on account of the corruption of his blood, they became extinct. For in escheats on account of petit treason or felony, a tenure is requisite, as well in the case of the King as in that of a subject.

[But by the above statute, no attainder except for high treason, petit treason, and murder, or of abetting the same, shall extend to disinherit the heir or to prejudice the right or title of any person other than the right or title of the offender during his life only.]

A trust estate does not escheat. Tit. 12. c. 1.

25. An use was not liable to escheat, because it did not lie in tenure; and as trusts are now what uses were before the statute 27 Hen. 8., it was determined in the following case, after great consideration, that a trust estate is not liable to escheat: but that where a *cestui que trust* dies without heirs, the trustee shall retain the land for his own benefit.

Burgess v. Wheate, 1 Black. R. 123. 1 Eden, 177.

26. Elizabeth Gunning, being seised of certain lands in fee simple, *ex parte paternâ*, married Nicholas Harding: but previous thereto, in 1695, a settlement was made of her estate, to the use of Nicholas Harding for life, remainder to Elizabeth Gunning for life, remainder to trustees to preserve contingent remainders, remainder to their first and other sons in tail male, remainder to the right heirs of Elizabeth Gunning.

There being no issue male of the marriage, an indenture was made in 1718, between Harding and his wife of the one part, and Sir Francis Page and R. Simmons of the other part, reciting the settlement of 1695, and covenanting to levy a fine, to assure the premises to the use of the daughters of the marriage, as tenants in common; and in default of such issue, to Sir Francis Page and Simmons, and their heirs, in trust for the said Elizabeth Harding, her heirs and assigns; to the intent that she might, at any time, during her life, without her husband's concurrence, dispose of the reversion to such uses as she should, by her will, or other writing, appoint; and a fine was accordingly levied.

There was no daughter of the marriage. The wife survived her husband: but died without making any appointment, and

without heirs on the part of her father. Burgess, the plaintiff, was her heir on the part of the mother.

After the death of Elizabeth Harding, Sir Francis Page, who survived Simmons, got into possession; and, in July 1739, Burgess filed a bill against him, praying, that if he had any legal interest in the premises, he should be compelled to convey it to Burgess. Sir Francis Page, by his answer, insisted that he was lawfully seised of the inheritance of the estate, and entitled to the rents and profits.

The Attorney-General, on behalf of the Crown, filed an information in Chancery, insisting that Sir Francis Page, by the deed of 1718, had no beneficial interest in the estate, in his own right, but was a mere trustee for the benefit of Mrs. Harding, or her appointee or heir; and in default of such appointment or heir, that he was a trustee for the benefit of his Majesty, who stood, in the place of such heir. That the premises were escheated, and the representatives of Sir Francis Page ought to convey to the use of his Majesty.

The case was argued before Lord Keeper Henley assisted by Lord Mansfield and Sir Thomas Clarke, Master of the Rolls.

Sir Thomas Clarke said, the great question was, whether the Crown had a right to a conveyance of the legal estate from Mrs. Harding's trustee, as an equitable escheat, by the death of Mrs. Harding without heirs on the part of the father. He should consider the right of escheat in three lights:—1. In what situation it stood in respect to a conveyance at common law, before the invention of uses. 2. In what situation it stood with respect to a conveyance to uses, before the statute of Uses was made. 3. How it stood since that statute, and now with regard to trusts. The result and application of the whole would decide the question, how far the Crown was or was not entitled in equity to a conveyance from the trustee.

1. An escheat was in its nature feodal; a feud was the right which the tenant had to enjoy the lands, rendering to the lord the services reserved by the contract. On the other hand, an interest remained in the lord, after the grant made, called a seignory, consisting of a right to the services of the tenant, and to the land itself, on the expiration of the grant, as a reversion; which was afterwards called an escheat. As the grant

was more or less extensive, the reversion was more or less remote; for feuds were sometimes temporary, sometimes hereditary, and a temporary one ended on the grantee's death.

Sir H. Spelman only took notice of hereditary feuds, nor did our laws: and though it might seem a paradox to modern ears, a feoffment to A. and his heirs did not pass a fee simple originally, in the sense in which it was now used: but only an estate to be enjoyed *ut merum beneficium*, without power of alienation, in prejudice of the heir of the lord; the heirs took it successively as an usufructuary interest; and in default of heirs, the land escheated, or strictly speaking, reverted. If there was an heir, and by legal impediment he could not take, the land escheated. When a power of alienation was introduced, first with the licence of the lord, and afterwards without such licence, the right of escheat became more remote; and when a power of charging or encumbering the feud was given to the tenant, the lord took the escheat subject to the incumbrance. This power was more prejudicial to the right of escheat than the power of alienation; for that only changed the lord's chance, but the incumbrances defeated the right of escheat as far as they went.

Bract. 23 a. 46 Edw. 3. pl. 4. Bro. Ab. Tit. Escheat, 2.

Bract. 382 a.

2. Upon the introduction of uses, two distinct kinds of property might be acquired in land; the legal estate and the use. *Cestui que use* was no longer tenant at law, nor was the land subject to his incumbrances. But though the land was not liable at law on account of the *cestui que use*, yet it was still liable on account of the feoffee to uses. This being found extremely inconvenient, a variety of statutes were made to restore the fruits of the tenure to the lord, against the *cestui que use*, as relief, wardship, &c.; but no statute was made to restore the loss of the escheat; which, as Sir H. Spelman observes, is not only the fruit of the tenure, but the very tree itself.

Bro. Uses, pl. 10.

Vide Tit. 11. c. 2.

3. Thus stood the law till the Statute of Uses united the use and the legal estate: but as the courts of law determined that there were some uses to which the statute did not extend, they were called trusts, and succeeded to uses, *aliusque et idem nascitur*. The Court of Chancery having taken cognizance of trusts, adopted, in the construction of them, all those rules by which uses had been governed before the statute. The case of curtesy was the only exception; and that seemed to have pre-

vailed unaccountably, and against the opinion of the Judges themselves.

Before the Statute of Uses, if a *cestui que use* was attainted of treason or felony, the lord could not have the land, but the feoffee might retain it to his own use. 5 Edw. 4. pl. 18. fo. 7 *b.* was an authority in point against the lord's claim, and questions who should have. If the lord was at law entitled to an escheat on death without heirs, or attainder of feoffee to uses, and not on death, &c. of *cestui que use*, it strengthened the authority of the case. That if it had been determined otherwise, in favour of the lord, it would have given him a double chance for his escheat.

Brook, pl. 34. agrees, the lord shall not have it, nor the heir, by reason of corruption of blood; and that feoffee shall retain it to his own use. And though this was introduced by an *ideo videtur*, in a modest manner, yet many of his opinions were so introduced, and had generally been thought of great authority. From this it was clear, that if Mrs. Harding had been *cestui que use*, and attainted of treason or felony, the lord would not be entitled to escheat; and if trusts in equity were analogous to uses at law, and he thought they were, neither would the Crown be entitled in the case of a trust in equity. Feoff. al. Use.

Sir G. Sands's case was in point: and that and the case in 5 Edw. 4. mutually strengthened each other. Att. Gen. v. Sands, Tit. 12. c. 2.

It had been said, if the legal estate had escheated to the Crown for want of an heir to the trustee, it would in equity have been liable to the trust, but this position was not proved by any authority. And if it were true, why ought the lord to have a reciprocal equity on the death of the *cestui que trust*, without heirs? Upon the whole, his opinion was (to use the words of Sir Joseph Jekyll,) that the title of the trustee should not have been set up, but as it was set up, it appeared a plain and subsisting one. The law was clear; and courts of equity ought to follow it in their judgment concerning titles to equitable estates; otherwise great uncertainty and confusion would ensue.

Lord Mansfield said, he would follow the method used at the bar, under the four following heads: 1. The nature of trusts of land, and the rules that governed them. 2. The nature of that right by which the King claimed in this case. 3. Whether, if the trustee had died without heir, the King must not in that

case have taken the land, in a court of equity, subject to the trust. And, 4. Apply the result of the inquiry, as between the King and the trustee, to the particular point immediately in judgment.

1. As to the nature of trusts of land, and the rules by which they were governed. By an inquiry into the nature of an use or trust of lands, no more was or could be meant, than to find out historically on what principles courts of equity, before the statute 27 Hen. 8. interfered in modifying or giving relief in rights or interests in lands, which could not be come at but by suing a *subpœna:* and what courts of equity now did in modifying, directing, and giving relief in cases of trusts, where there was no other remedy but by bill. Whoever shewed that the relief then given was more extensive; that it was considered by different or opposite rules; that the right was considered in different or opposite lights, would shew the difference and contrast between uses and trusts. The opposition was not from any metaphysical difference in the essence of the things themselves; an use and a trust might essentially be looked upon as two names for the same thing: but the opposition consisted in the difference of the practice of the Court of Chancery. If uses before the statute 27 Hen. 8. were considered as a pernancy of the profits, as a personal confidence, as a *chose in action*, and now trusts were considered as real estates, as the real ownership of the land, so far they might be said to differ from the old uses; though the change might not be so much in the nature of the thing, as in the system of law by which it was regulated. The old law of uses did not conclude trusts now; where the practice was founded on the same reason and grounds, it was still followed: but its positive authority did not bind, where the reason was defective; more especially that part of the old law of uses which did not allow any relief to be given for or against any estates in the *post*, did not now bind by its authority in the case of trusts.

Trusts, from the nature of the thing, might be left to the honour and faith of the trustee; in that case they were not the objects of law, otherwise than as they might be fraudulent and void in respect to third persons; or a court of justice might take cognizance, or compel the execution of them: in that case trusts only retained the name in substantial ownership, the disposition

in trust became the mere form of a legal conveyance. Trusts in England, under the name of uses, began, as they did in Rome, under no other security than the trustee's faith; they were founded in fraud, to avoid the statutes of mortmain. Trusts were not on a true foundation till Lord Nottingham held the great seal; by steadily pursuing trusts from plain principles, and by some assistance from the Legislature, a noble, rational, and uniform system of law had been raised; trusts were made to answer the exigencies of families, and all other purposes, without producing one inconvenience, fraud, or private mischief, which the statute of Henry VIII. meant to avoid. The *forum* where they were adjudged was the only difference between trusts and legal estates: trusts in the Court of Chancery were considered, as between the *cestui que trust* and trustee, as the ownership and as legal estates; whatever would be the rule at law, if it was a legal estate, was applied in equity to a trust estate. Trust estates were liable to curtesy: the case of dower was the only exception; and not in law or reason, but because a wrong determination had misled in too many instances to be altered and set right; and if an alteration was to be introduced, the best way to set it right would be to allow the wife dower of a trust estate.

In the eye of the Court of Chancery, Lord Hardwicke thought the equity of redemption was the fee simple of the land; that it would descend, might be granted, devised, entailed; and that equitable entail might be barred by a common recovery. This proved it was considered in Chancery as an estate whereof there might be a seisin, for without such a seisin a devise of a trust could not be good. Casburne *v.* Inglis, Tit. 15. c. 3.

The allowing curtesy of a trust was founded on the maxim that equity follows the law; which was a safe as well as a fixed principle, for it made the substantial rules of property certain and uniform, be the mode of following it what it would. It followed, from the great authority of this determination, on clear law and reason, that the *cestui que trust* was in the consideration of Chancery, actually and absolutely seised of the freehold.

To conclude this head, an use was originally understood to be merely an agreement by which the trustee, and all claiming in privity under him, were personally liable to the *cestui que trust*, and all claiming under him, in like privity. Nobody in the *post*

was entitled under, or bound by the agreement: but now the trust in Chancery was the same as the land, and the trustee was therefore considered merely as an instrument of conveyance; he was in no event to take a benefit. The trust must be co-extensive with the legal estate; and where it was not declared, it resulted by necessary implication, because the trustee was excluded; except where the trust was destroyed by a conveyance to a purchaser, without notice, for a valuable consideration.

The trustee could transmit no benefit: his duty was to hold for all those who would have been entitled, if the limitation had not been by way of trust. There was no distinction now between those in the *per* and the *post*, except in the case of dower, which was not founded on reason, but on practice.

As the trust was the land in Chancery, so the declaration of trust was the disposition of the land; and therefore an essential omission in the legal disposition should not destroy the trust.

The grounds why the lord by escheat neither took, nor was subject to, an use, did not now subsist. The principles upon which the question must now be argued had no relation to it, whichever way it ought to be determined; or, rather, none of those principles were made or could ever be considered in the law of uses; for the Court of Chancery never interposed in cases where the claim was in the *post*, and for that reason it was taken for granted, in Edward IVth's time, that the lord should not have it.

2. This brought him to consider the nature of the right by escheat.

It had been truly said that, on the first introduction of the feudal law, this right was a strict reversion; when the grant determined by failure of heirs, the land returned, as it did upon the expiration of any smaller interest. It was not a trust: but the extinction of the tenure; as Mr. Justice Wright said, it was the fee returned.

This distinction held equally, whether the investiture was to special or general heirs; for originally the tenant could not alien in any case, without the lord's concurrence. The reversion took effect in possession for want of an heir, unless the lord had done or permitted what in point of law amounted to a consent

to a new investiture, or change of his vassal; this was the meaning of what was said in the books, that nothing escheated, where the tenant was in by title.

As soon as a liberty of alienation was allowed without the lord's consent, this right became a caducary succession, and the lord took as *ultimus hæres:* but the resemblance of the lord's right by escheat to that of the heir by descent did not hold throughout; and therefore Sir Edward Coke, with great accuracy, considered the lord by escheat as assignee in law. He took no possibility or condition, or right of action, which could not be granted. He could not elect to avoid voidable acts, as a feoffment of an infant, with livery: but every right preserved to the heirs, which could be granted, went to the lord by escheat, as a rent reserved to the tenant and his heirs. 1 Inst. 215.

In the case of Thruxton *v.* Attorney-General, the benefit of a trust term was decreed to the King, taking by escheat, because it was to go with the inheritance, by the express limitation of the parties. Ante, Vol. I. 426.

3. Whether, failing heirs of the trustee, the King must not in this case have taken the estate in a court of equity, subject to the trust.

This seemed to be a very material consideration; for if the King was not to be subject to the trust, there was no colour that he should claim the trust by escheat. That land escheated should be subject to the trust appeared to him to be most consistent with the King's right, whether the escheat were considered as a reversion, as it once was, or as a caducary succession *ab intestato,* as it then substantially was. The King could not claim by escheat, contrary to the terms or conditions which the tenant held under; from which two things followed,—1st. That there was equity against the King; and, 2dly, That the lord was bound as much, in a court of equity, by the equitable terms of his investiture, as he was in a court of law by the legal terms. Taking the estate as a caducary possession, the lord could only take *ab intestato,* absolutely; so far as the tenant had not disposed of the estate he could take, and no farther. The tenant's power of disposing was absolute, without the lord's privity, without any determined form of conveyance. The trustee had, by his declaration of trust in 1718, made a valid conveyance of his trust in equity; and therefore a court of equity could not,

he apprehended, suffer the land to go as undisposed of by the tenant; because in the consideration of Chancery there was a valid disposition made by him: but even at law the escheat would not be free from the trust. The statute of Frauds made a trust estate assets in the hands of the *cestui que trust*; consequently, for that purpose, the estate descended to the heir.

In 18 Cha. II. before trusts were put on the rational footing they were now, the apprehension of the judges was, that the lord by escheat ought to be subject to the trust. Lord Bridgman thought so in 1702. Sir John Trevor certainly knew there could be no escheat of an use. If it was not to be subject to the trust, he thought the inconvenience would be very great; and where they were not tied down by any erroneous opinions, which had prevailed so far in practice that property would be shook by an alteration of them, arguments of convenience and inconvenience were always to be taken into consideration. Almost all the great estates in England were now limited in trust; the trustees were men of business, probably concerned for the family, and at a little distance of time their pedigrees were not to be traced; and if the surviving trustee was to die without heir, it would be thought hard, if the estate should be lost. But he rested upon this,—it seemed to be a contradiction in terms, that he who had no claim but *ab intestato*, where the owner had not disposed of his property, should take contrary to, and in prejudice of his disposition.

An escheat was now as much a title under the former owner, in consequence of his former seisin, as that of the heir. Why else should the lord be deemed the assignee or heir of the tenant? He thought the lord might be considered as much his heir as the heir by blood, and was as much liable to all his dispositions.

4. If what he had said was right, little was left for him to say on this head. If the lord took an escheat as heir or assignee in law, then the King was within the express declaration of trust, which was, to Elizabeth Harding, her heirs and assigns. And upon the whole, he thought the King was entitled to a decree.

The Lord Keeper said, the question on the information was whether *cestui que trust* dying without heirs, the trust was es-

cheated to the Crown, so that the lands might be recovered in a court of equity by the Crown; or whether the trustee should hold them for his own benefit. He should consider,—1st, The right of lords to escheat at law. 2dly, Whether they had received a different modification in a court of equity. 3dly, The arguments used in support of the information. And, from the whole, draw a conclusion that the Crown had no equity.

1. The legal right of escheat arose from the law of enfeoffment to the tenant and his heirs; and then it returned to the lord, if the tenant died without heirs. The extension of the feoffment from the person of the tenant to the heirs special of his body, and then to his heirs and assigns, was accurately traced in a Treatise of Tenures by a learned hand. This reduced the condition of the reversion to this single event, *ob defectum tenentis de jure*. The lord became entitled to the land by escheat, in lieu of his services. The books were uniform, that in the case only of the tenant's dying without heir, the escheat took place: as long as the tenant, or his heir, or any other person, by his implied assent, continued in possession by title, that prevented the escheat. This shewed, that where there was a tenant actually seised, though he had no right to the tenements, and though the person who had right died without heirs, yet the escheat was prevented; for if the lord had a tenant to perform the services, the land could not revert in demesne.

Sir Martin Wright.

1 Roll. Ab. 816.
1 Inst. 268 b.

Upon these cases he would observe, that the lord's consent had nothing to do with establishing the right of the tenant's being duly seised; because in every one of these cases, they all came in without the lord's consent; unless it could be said that the lord was a virtual assenter, as well to the disseisins, as to the legal conveyances; and if that were so, it would operate to the establishing the right of the trustee in Chancery, who would say he was entitled under a conveyance in law, by the very consent of the lord, which was a stronger case than a disseisin. From these cases and authorities it must be allowed to be settled, that the law did not regard the tenant's want of title, as giving the lord a right to the escheat.

2. The next consideration was, whether a court of equity could consider it in a different light. Now, when the tenant did not die seised, and a proper legal tenant by title continued, could the Court of Chancery say to the lord, your seigniory is extinguished:

and to the tenant, your tenancy is so too; though both were legal rights, then subsisting at law?

In consideration of uses, with regard to escheats, equity had proceeded on the same principle as law, where there was a tenant of the land, who performed the services; and he did not find the Court had any regard to the *merum jus* of the tenant. Now, the reason why there was no escheat on the death of *cestui que use*, in equity, seemed to be this (and it was a reason equally applicable to uses and trusts), that the Court had nothing to issue a *subpœna* upon, no equity, nothing to decree upon; and every person must bring an equity with him for the Court to found its jurisdiction. It seemed to him, he could have no equity in the case of an use, or as owner of the trust, for this plain reason; an use before the statute could not be extended further than the interest in the estate which the creator of the use could have enjoyed. As if the creator of the use had a fee simple in the land, he could take back no more interest in the use, either declared or resulting, than he had in the land. If he made a feoffment, and declared no uses, it resulted to him in fee, which was to him, his heirs, and assigns. The consequence was, that the moment he died without heirs or assigns, there was no use remaining. How, then, could you come to Chancery for a *subpœna* (whether he took back the same or a different use) to execute an use or trust which was absolutely extinct?

That seemed to him the plain and substantial reason why, in the present case, whether it was an use or a trust, there was no basis on which to found a *subpœna*. The Lord Chief Justice's system was very great and noble, and very equitably intentioned; such a system as he should readily lay hold of upon every occasion, if he thought he could do it consistently with the rules of law. Where a person passed the estate without consideration, there, in modern language, an use resulted; because it was unequitable that a man should have an interest in the estate, when he had paid no consideration for it. But where a person was not party to the deed, nor privy to the estate, he did not see how any thing could result for his benefit. That this was the notion in respect to an use appeared from authorities. The law was, that the lord could not have the escheat of an use; so was 5 Edward 4. for he took that to be the report of a case. Then it had all the authority the Year Books carried with them: and this had

Ante.

been adopted by all the writers since. Bacon 79, did not question the authority of that case: he gave a reason of his own, which he substituted as a better than that in the books; that there was a tenant in by title, which was a strong reason in law; but he did not mention that as a reason, with regard to the *subpœna*. It was not a conclusive reason that the lord should not have a *subpœna*, because there was a person in possession: he should have it for that reason, if that person was liable to him in equity. Therefore he gave a better reason; because, says he, it never was his intent to advance the lord, but his own blood. Therefore that was the reason; it would not be within the intention of that trust, that any beside the blood of the covenantor should take. Nobody could imagine the tenant intended to provide a trust, to answer the lord's escheat. Mrs. Harding never thought of escheat, he supposed: but had it been suggested to her, if she died without heirs that could possibly take her estate, would she rather have the friend she had chosen to make her trustee have it, or that it should go to the King? She must have been a subject of more zeal than he could suggest, if she had said she would give it to the King.

Bac. Read. 12. edit. 1785.

As he was stating the law of escheats with regard to uses and trusts, he would take notice of an objection that seemed equally to affect the opinions of lawyers, with regard to the doctrine of uses and trusts. That was the dilemma which was urged at the bar, as the basis of the equity in this case, though he did not think it a necessary dilemma, viz. that the lord must have the estate by escheat, either on the death of the *cestui que trust* without heirs, or of the trustee without heirs, discharged of the trust: but if he could not have it while the trustee lived, while there was a tenant, it would be monstrous that the *cestui que trust* should be prejudiced by the putting the estate in the trustee's hands for the benefit of the family. One part of this was a dangerous conclusion, the other was not; his answer was, that if the law were so, that the lord should in that case take it discharged of the trust, he must suppose it no injury or absurdity at all; *volenti non fit injuria*. The creator of the trust determines to take the convenience of the trust, with its inconvenience. It was most certain every man who created a trust put his estate in the power of his trustee: if the trustee sold it for a valuable consideration, without notice, no Court could relieve

the owner from this misfortune, it was the result of his own act; and yet that was as shocking a perfidy in the trustee as could be: but the Court could not interpose, as it would affect the rights of others, of third persons. But he did not think this was at all a necessary dilemma. The lord might not be entitled on the death of *cestui que trust* without heir, because there was no equity, for he had a tenant, as he had before. But possibly there might be an equity the other way against the lord; for if the trustee died without heir, and the lord had the estate, the Court of Chancery might say, You shall hold to compensate yourself for your rent and services, but we will embrace the rest for the *cestui que trust*.

A difference was attempted to be made between uses and trusts; but, by comparing the definitions of the two, it would appear they were precisely the same. It was said the difference consisted in this, that equity had shaped them much more into real estates than before, when they were uses; as now there was tenancy by the curtesy of a trust, it might be entailed; and the entail might be barred by a common recovery. But why? Not from any new essence they had obtained, but from carrying the principle farther. *Quia equitas sequitur legem:* for as between the trustee and *cestui que trust*, the Court of Chancery had jurisdiction; and he thought they should have equally extended the rules and principles of uses, as well as those of trusts.

That it would be a bold stroke to say, Chancery considered trusts as a mere nullity; and that they were to be treated in the same manner as if they continued in the seisin of the creator of them, or of the person for whom they were made. Rules of property were not to be questioned, even by the judges: while the people continued satisfied, and acquiesced in them, none but the Legislature could alter them. His objection to the claim in the information was, not that it was to have a trust executed, as if it were land: but it was to claim the execution of a trust that did not exist. If there was a trust, he should consider it merely as an estate, and determine accordingly: but the creation of a trust never could affect the right of a third person.

He could assign but one reason why that distinction between tenancy by the curtesy and dower had prevailed, and it was applicable to the reason of this case. He had heard the House of

Lords were startled at the distinction: they were told the opinion of conveyancers was so; and that, if it was altered, it might load purchasers with dower, who thought they had purchased free from it; and the Lords would not reverse the judgment, because they would not let it affect the right of a third person. It appeared that at law there could be no escheat, while there was a tenant *de jure;* in equity there could be none while trusts were called uses; and a trust and an use were exactly the same. How then could he say the lord should lose his escheat, when any man, for his own convenience, put his estate in trust. It seemed, if he were to do so, that he would *give* law and equity, and not *pronounce upon* law and equity.

Two centuries had passed since uses and trusts had been admitted, and he could not find a *dictum* that the Crown should have an escheat of a trust.

The judgment in Sir George Sands's case being an authority in point, great efforts were made to weaken its validity. But Lord Hale had determined on great principles of law; and he could not help remarking, that neither the bar nor the bench were ever frightened at the ill consequences which had been mentioned. The information on the part of the Crown was dismissed. Tit. 12. c. 2.

27. In a subsequent case Lord Thurlow said, Burgess *v.* Wheate was determined upon divided opinions, and which opinions continued to be divided, of very learned men. The argument of the defect of a tenant seemed to be a scanty one. Whether that case was such an one as bound only when it occurred *speciatim*, or afforded a general principle, was a nice question. Middleton *v.* Spicer, 1 Bro. Rep. 201. Hargrave, Juris. Exer. Vol. 1. 383.

28. An equity of redemption is considered as not liable to escheat; and in the case of Burgess *v.* Wheate the Lord Keeper said,—"If a mortgagor die without heir,—shall the mortgagee hold the land free? I answer, Shall it escheat to the Crown? No, because in that case the lord has a tenant to do his services; and that is the whole he is entitled to in law and equity. What the justice might be between the mortgagee and executor I shall not trouble myself about. I think the Crown has not an equity on which to sue a *subpœna*." Nor an equity of redemption. 1 Black. R. 184.

29. Where money is directed to be laid out in the purchase of land, but the quality of real estate is not imperatively and Nor money to be laid out in land.

definitively fixed upon it by the instrument; and it remains, *ad arbitrium*, whether it is to be considered as land or money; it has been held by the Court of Chancery that, on failure of heirs, the Crown has no equity against the next of kin to have it laid out in real estate, in order to claim the escheat.

Walker v. Denne, 2 Ves. Jun. 170.

To whom lands escheat. Dissert. c. 3. s. 38.

30. It has been stated that all the lands in England are now held in socage, either immediately of the King, or mediately of some private person, by fealty and other services which are preserved to the lord by the statute 12 Cha. 2. To the feudal lord therefore all lands escheated belong; so that where freehold lands are held in fee of a manor, the escheat is to the person who is lord of that manor. In the case of a seignory in gross, the escheat is to the person entitled to that seignory; and where it cannot be ascertained of whom freehold lands are mediately held, then the King, as the great and chief lord, shall have them by escheat; for to him fealty belongs, and of him they are certainly holden by presumption of law, and without necessity of proof. With respect to copyhold estates, it has been shewn that they are always held of some manor; consequently, they must escheat to the lord of that manor.

Ante, s. 23.

12 East. 109. 110. May v. Street, Cro. Eliz. 120.

Tit. 10. c. 1. s. 18.

1 P. C. 254.

31. Those who have royal franchises, such as the Bishop of Durham, whose county is palatine, have all royal escheats, of which Lord Hale gives several instances.

The lord by escheat may distrain for rent. 1 Inst. 215 b.

32. The lord by escheat may distrain for rent due to the last tenant; as if there be lord and tenant, and the tenant makes a lease for life, rendering rent, if he afterwards dies without an heir, whereby the reversion comes to the lord, by way of escheat, he may distrain for the rent, because it is incident to the reversion. But he cannot take advantage of a condition of re-entry, because he is not heir to the lessor.

Entitled to a term to attend.

33. Where the inheritance escheats, and there is an outstanding term, which is attendant on the inheritance, the lord by escheat will be entitled to such term.

Thruxton v. Att. Gen. 1 Vern. 340.

34. A person seised in fee limited a term for one hundred years to trustees, in trust to attend the inheritance; he afterwards died without an heir, being a bastard. The question was whether this term should go to the King with the inheritance.

It was determined that the King was entitled to the term: for he was not in, barely in the *post*, but in the *per* also; and the

term for years went with the inheritance, by the express limitation of the party.

35. The lord by escheat is entitled to all the charters concerning the lands escheated. And it is said in Brook's Ab. that if a tenant is attainted of felony, the lord shall have his lands by escheat, and also the charters; though the charters are not forfeited. And to all charters. Tit. Charters, 39.

36. The lord who acquires the land by escheat is liable to all the incumbrances of the last tenant. Thus if a person dies without heirs, having granted a rent, the lord by escheat will hold the lands subject to such rent. So if he dies leaving a wife, she will be entitled to dower; and in the case of a woman, her husband will be entitled to curtesy. For as the tenant has the power to defeat the lord's right to an escheat by any mode of alienation, he must consequently have every inferior power. Is subject to incumbrances. 7 Rep. 7 b.

37. Where a copyhold estate escheats to the lord of the manor, he will hold it subject to any lease made by the copyholder, with the licence of the lord; and also to the free bench of the widow. But Lord Mansfield has said, that in all manors where admission is necessary to alienation, the escheat is absolute, the lord's consent being still necessary. In those copyholds, the lord is not bound by debts, alienation, or trusts; they are all void against him: if he consents to a condition or trust on the court-roll, then he is bound by it; for he cannot claim against his own act. But in freeholds, the form of his concurrence not being necessary, he is always considered as much bound as if he was party to the deed of alienation which makes the trust; because the power which the tenant now has by law is equivalent to the lord's consent to the grant, when it was a strict reversion. Turner v. Hodges, Hut. 102. 1 Black. R. 167. Weaver v. Maule, 2 Russ. & Myl. 423.

38. The reason that the lord by escheat is subject to incumbrances is, because they are annexed to the possession of the land, without respect to any privity; but the lord who comes in by escheat is not subject to any incumbrances annexed to the privity of estate; for he comes in in the *post*, and therefore was not bound to execute an use, his title being paramount, namely, by force of the condition in law tacitly annexed to the land, at the time of the creation of the seignory, which he had to his own use. Was not bound to execute an use. Tit. 11. c. 2.

39. It follows, by a strict analogy from the case of an use, that the lord by escheat is not bound to execute a trust. In the Is not subject to a trust.

Tit. 11. c. 2. s. 16.

case of the Crown it is laid down in all the books that the King could not be seised to an use; from which it appears to follow that he cannot be a trustee, except in particular cases. And it

Tit. 12. c. 1. s. 89.

appears from a modern statute 39 & 40 Geo. 3. c. 12. to have been understood that where the King acquired an estate by escheat, he was not compellable to execute any trust, to which such estate was liable; for by that statute the Crown is enabled

Tit. 34.

to direct the execution of any trust to which lands escheated are liable, and to make any grants of such lands.

Hard. 467.

[40. In Pawlett *v.* Attorney-General, a bill was brought to redeem a mortgage which had vested in the King by the attainder of the heir at law of the mortgagee. Sir Matthew Hale was of opinion that the King could not in equity be compelled to reconvey; but that an *amoveas manum* only lay in such case, and that was all which could be done in case a trustee forfeited his estate.

2 Atk. 223.

41. In Reeve *v.* Attorney-General, an estate, escheated to the Crown, was charged in equity by the will of the person dying, and for want of whose heir the estate escheated, with several legacies. The legatees filed their bill to have the estate sold, and the question was, whether an estate escheated to the Crown, can be affected by a trust. The bill was dismissed. The above

1 Ves. S. 446. Belt's ed. 1818. 2 Scho. & Lef. 617.

case was cited in Penn *v.* Lord Baltimore, and it is reported that Lord Hardwicke said that where the Crown was a trustee, the Court had no jurisdiction to decree a conveyance, but they must go to a petition of right.]

Pa. 67.

42. With respect to private persons, Carter reports Lord Bridgeman to have said [in Geary *v.* Bearcroft,] that where a man conveys lands in trust, and the trustee is attained of felony, the lands shall be forfeited; though the *cestui que trust* may

Prec. in Chan. 200.

have relief in equity. And Sir J. Trevor, M. R. lays it down [in Eales *v.* England,] that if a trustee dies without heir, the lord by escheat shall have the land; yet subject to the trust in equity.

Juris. Exer. Vol. I. 390.

Mr. Hargrave has controverted these authorities. As to the first, he says he was in possession of Lord Bridgeman's own manuscript reports of his judgments while he was Chief Justice of the Common Pleas: (*a*) compositions far exceeding Carter's

(*a*) These judgments have been published from Mr. Hargrave's MSS.—*Note to former edition.*

account of the judgments, in copiousness, depth, and correctness; in which there was not an *iota* which in the least imported an opinion, that upon escheat the lord comes in subject to any trust; and as to the second, the opinion seemed too much of a loose *dictum* to command much attention.

43. In a case determined in 17 Cha. 2., where a person seised in fee contracted to sell his estate, and died before assurance, without any heir, so that the lands escheated to the lord, the Court refused to compel the lord to convey to the vendee; which could only be upon the principle that the lord by escheat was not compellable in equity to execute a trust. Stephens *v.* Baily, Nels. 107. Vide Pawlett *v.* Att.-Gen. sup.

44. It is said by Lord Macclesfield, that if a trustee of a copyhold dies without heir, the lord becomes entitled by escheat, without being subject to the trust. 1 Stra. 454. Williams *v.* Lonsdale, 3 Ves. Jun. 752.

45. There were formerly officers called escheators, whose duty it was to find offices upon the death of the King's tenants for the purpose of ascertaining whether they left any heirs, and to certify their inquisitions into the Exchequer. But these offices have long since ceased; and now, where a person is supposed to have held his lands of the Crown, and to have died without heirs, a commission of escheat is issued, to ascertain the facts. Office of escheator.

46. In a modern case, Lord Eldon said it was usual for the Crown to give to the person making discovery of an escheat as good a lease of the lands escheated as it could. 7 Ves. 71. Vide Tit. 34.

TITLE XXXI.

PRESCRIPTION.

CHAP. I.

Prescription by Immemorial Usage.

CHAP. II.

Statutes of Limitation.

CHAP. I.

Prescription by Immemorial Usage.

SECT. 1. *Origin of Prescription.*
6. *Prescription by Immemorial Usage.*
8. *May be in the Person or in the Estate.*
10. *What may be claimed by*
21. *Must be beyond time of Memory.*
SECT. 25. *And have a continued Usage.*
28. *And be certain and reasonable.*
35. *How a Prescription may be lost.*
42. *Descent of Prescriptive Estates.*

SECTION I.

Origin of Prescription.

BY the law of nature, occupancy not only gave a right to the temporary use of the soil, but also a permanent property in the substance of the earth itself, and to every thing annexed to or issuing out of it. Hence possession was the first act from which the right of property was derived; it has therefore been established as a rule of law, in every civilized country, that a long and continued possession should give a title to real property.

Vin. ad Inst. Lib. 2. Tit. 6.

2. This mode of acquisition was well known in the Roman law by the name of *usucaptio*, because a person who acquired a

title in this manner might be said, *usu rem capere;* and is thus defined by Modestinus, *Adjectio dominii per continuationem possessionis temporis lege definiti.* In the English law it is called prescription; and Lord Coke says, *prescriptio est titulus ex usu et tempore substantiam capiens, ab auctoritate legis.* 1 Inst. 113 b.

3. The doctrine of prescription appears to have been long established in England; and, from what is said of it in Bracton, seems to have been derived from the Roman law; for he lays it down that a title may be gained, both to corporeal and incorporeal hereditaments, by a long and uninterrupted possession. *Dictum est in precedentibus qualiter rerum corporalium dominia ex titulo, et justa causa acquirendi, transferuntur per traditionem. Nunc autem dicendum qualiter transferuntur sine titulo, per usucaptionem; scil. per longam continuam et pacificam possessionem, ex diuturno tempore, et sine traditione.* Lib. 2. c. 22.

4. Every species of prescription, by which property is acquired or lost, is founded on this presumption, that he who has had a quiet and uninterrupted possession of any thing, for a long period of years, is supposed to have a just right, without which he could not have been suffered to continue in the enjoyment of it. For a long possession may be considered as a better title than can commonly be produced, as it supposes an acquiescence in all other claimants; and that acquiescence also supposes some reason for which the claim was foreborne.

5. By the law of England a prescription can only be made to incorporeal hereditaments, such as rents, rights of way and common, &c. for no prescription can give title to lands or other corporeal inheritances, of which more certain evidence may be had. Thus Sir W. Blackstone says, a man shall not be said to prescribe that he and his ancestors have immemorially used to hold the castle of Arundel; for this is clearly another sort of title, a title by corporeal seisin and inheritance, which is more permanent, and therefore more capable of proof, than that of prescription. But as to a right of way, a common, or the like, a man may be allowed to prescribe, for of these there is no corporal seisin. The enjoyment will be frequently by intervals; and, therefore, the right to enjoy them can depend on nothing else but immemorial usage. There is, however, another kind of prescription established by the statute law, extending to corporeal here- See stat. 2 & 3 Will. 4. c. 71. s. 2.

ditaments, by which an uninterrupted possession for a certain number of years will give the possessor a good title, by taking from all other persons the right of entering on such hereditaments, or of maintaining any species of action for the recovery of them.

Prescription by immemorial usage.

6. There are, therefore, two kinds of prescription known to the English law. First, a prescription to incorporeal hereditaments by immemorial usage; as where a person shews no other title to what he claims than that he and all those under whom he claims have immemorially used to enjoy it; which may be called a positive prescription.

1 Inst. 113 b. 4 Rep. 31 b.

7. A prescription by immemorial usage differs from custom in this respect, that a custom is properly a local usage, not annexed to the person; such as the custom that all the copyholders of a manor have common of pasture upon a particular waste: whereas prescription is always annexed to a particular person.

May be in the person, or in the estate.

8. This kind of prescription is of two sorts. Either it is a personal right, which has been exercised by a man and his ancestors, or by a body politic and their predecessors; or else it is a right attached to the ownership of a particular estate, and only exercisable by those who are seised of that estate. In the first case it is termed a prescription in the person; in the second case it is called a prescription in a *que estate.*

6 Rep. 60 a.

9. A prescription in a *que estate* must always be laid in the person who is seised of the fee simple. A tenant for life, for years, or at will, or a copyholder, cannot prescribe in this manner, by reason of the imbecility of their estates; for, as prescription is always beyond time of memory, it would be absurd that those whose estates commenced within the memory of man should pretend to prescribe for any thing. Therefore, a tenant for life must prescribe under cover of the tenant in fee simple, and a copyholder under cover of his lord.

What may be claimed by.

10. It has been stated that prescription by immemorial usage only extends to incorporeal hereditaments, such as rents, commons, ways, &c. (*a*) Nothing, however, can be claimed by pre-

(*a*) By the general law all pews in a church belong to the parishioners at large; but the distribution among them rests with the ordinary. There may, however, be a right paramount to the ordinary by immemorial usage: but this prescriptive right must be annexed to the occupation of a *messuage*, and all repairs must have been done at the expense of the party setting up the prescription. Pettman *v.* Bridger, 1 Phil. 316.—*Note to former edition.*

scription which owes its origin to matter of record; for prescription being only an usage *in pais*, does not extend to those things which can only be acquired by matter of record; such as goods and chattels of traitors, felons, and fugitives; deodands, &c. but to treasure trove, waifs, estrays, wrecks, park, free warren, fairs, markets, and the like, a title may be made by prescription. Tit. 27. s. 95. 1 Inst. 114 a. 5 Rep. 109 b.

11. A prescription by immemorial usage can in general only be for things which may be created by grant; for the law allows prescriptions only to supply the loss of a grant. Ancient grants must often be lost; and it would be hard that no title could be made to things lying in grant, but by shewing the grant. Upon immemorial usage, therefore, the law will presume a grant, and a lawful beginning; and allows such usage for a good title: but still it is only to supply the loss of a grant. Therefore, for such things as can have no lawful beginning, nor be created at this day, by any manner of grant, or reservation, or deed, that can be supposed, a prescription is not good. 1 Vent. 387. Gibson v. Clark, 1 Jac. & Walk. 159.

12. A person may have frank foldage by prescription, but it must be appendant to land; and a man may prescribe that he and his ancestors, time out of mind, have had frank foldage of the beasts of his tenants, in a particular place. 1 Inst. 114 b.

13. In trespass, the defendant justified under a prescription, that the lords of the manor of H. had, and always used to have, free foldage throughout the vill of H., and to have the penning of the sheep; so that the vill of H. ought not to have free foldage, without the consent of the lord; and that if any levied a fold, without such consent, the lord had used to abate it. Jeffery at Hay's case, 8 Rep. 125.

It was urged, that this prescription was void, being against common right, which gave every one foldage in his own land. *Sed non allocatur*, for every prescription is against common right; and it did not extend to deprive the owner of the whole interest and profit of his land, which would not have been good; but only precluded him from setting up hurdles, which was a reasonable prescription, and restrained a particular profit only. Punsany v. Leader, 1 Leon. 11.

14. In a modern case it was held that an ancient grant without date does not necessarily destroy a prescriptive right; for such grant may either be prior to the time of memory, or in confirmation of such prescriptive right.

Addington v. Clode. 2 Mont. R. 148.

15. In trespass the defendants pleaded, that Clode was seised of a messuage, &c.: that he and all those whose estate he had, &c. for the time being, had and used, and had been accustomed to have and use, and so still of right ought to have and use, common of pasture in the place where, &c. for all commonable cattle, *levant* and *couchant*, &c. and thereupon justified.

The plaintiff traversed the right of common; and produced two ancient charters, without date, containing a grant of common.

The judge being of opinion that these grants were inconsistent with the plea of prescription, a verdict was given for the plaintiff.

Upon a motion for a new trial, it was urged for the defendant, that these grants might only be in confirmation of an antecedent prescriptive right; and then were not inconsistent with it.

The Court was of opinion, that these grants might either be before time of memory, or else they might have been only in confirmation of a prior right: in neither of which cases would they have been inconsistent with a plea of prescription. It ought to have been left to the jury to decide whether either of these was the case. A new trial was granted.

Kitch. Courts, 105 b.

16. An easement, which is a service or convenience that one neighbour hath of another, without profit, as a way through his land, a sink, or such like, may be claimed by prescription: but a multitude of persons cannot prescribe for an easement, though they may plead a custom.

Pill v. Towers, Cro. Eliz. 791.

17. There can be no prescription for what the law gives of common right; therefore a lord of a manor cannot prescribe to have a court baron within his manor; because it is of common right, and incident to a manor. But a lord of a manor may prescribe to enlarge the jurisdiction of his court.

Lit. s. 183.

18. Where a person prescribes in a *que estate*, he can claim nothing under such prescription but what is appendant or appurtenant to land; for it would be absurd to claim any thing as the consequence of an estate, with which the thing claimed has no connection.

1 Inst. 121 a.

19. A person cannot prescribe for any thing in a *que estate* that lies in grant, and cannot pass without deed or fine: but in

him and his ancestors he may, because he comes in by descent, without any conveyance.

20. Although prescription in general only extends to incorporeal inheritances, yet Littleton says, tenants in common may be by title of prescription: as if the one and his ancestors, or they whose estate he hath in one moiety, have holden in common the same moiety with the other tenant, who hath the other moiety, and with his ancestors, or with those whose estate he hath, undivided, for time out of mind. s. 310.

Lord Coke observes on this passage, that it is founded on good authority: but that joint tenants cannot be by prescription, because there is a survivorship between them, though not between tenants in common.

21. There are two circumstances necessary to form a prescription. First, time whereof the memory of man runneth not to the contrary; which has long since been ascertained, by the law, to commence from the beginning of the reign of King Richard I.: though Sir W. Blackstone justly observes, it seems unaccountable that the date of legal prescription or memory should still continue to be reckoned from an æra so very antiquated. Must be beyond time of memory. Lit. s. 170. 2 Inst. 238. 9. 2 Inst. 31 n.

22. This time is understood, not only of the memory of any man living, but also of proof by any record or writing to the contrary: for if there be any sufficient proof by record, or writing, although it exceed the memory or proper knowledge of any man living, yet it is within the memory of man. For memory or knowledge is twofold: first, knowledge by proof, as by record or sufficient matter of writing; secondly, by a man's own proper knowledge. 1 Inst. 115 a.

23. It follows, that where there is any proof of the commencement (*a*) or origin of a right, since the time of Richard I., it cannot be claimed by prescription.

24. A vicar endowed *de minutis decimis* in the year 1310 sued Pringe *v.* Child, 2 Roll. Ab. 269.

(*a*) [The stat. 2 & 3 Will. 4. c. 71. shortens the time of prescription in certain cases, and enacts, that claims to rights of common and other profits *à prendre* shall not be defeated after thirty years' enjoyment, by shewing only the commencement; and that after sixty years' enjoyment the right shall be absolute, unless it shall appear that such right was had by consent or agreement, by deed or writing: and with respect to claims to rights of way or other easements, the periods are limited to twenty and forty years; and with respect to claims to the use of light, to twenty years. The act does not extend to Scotland or Ireland. s. 9.]

the parson appropriate for them. It was held that the parson could not prescribe against this endowment, though it was three hundred years past; for the prescription ought to commence since the endowment, which was subsequent to the time of limitation.

And have a continued usage. 1 Inst. 113 b. See 2 & 3 Will. 4. c. 71. s. 2.

25. Secondly, every prescription must have a continued and peaceable usage and enjoyment: for if repeated usage cannot be proved, the prescription will fail. But where a title has once been gained by prescription, it will not be lost by any interruption of the enjoyment of it for ten or twenty years.

Idem.

26. Thus, if a person has a right of common by prescription, and he takes a lease of the land for twenty years, whereby the common is suspended, he may, after the determination of the lease, claim the common again by prescription; for the suspension was only of the enjoyment, not of the right.

27. Formerly a person might have prescribed for a right, though the enjoyment of it had been suspended for an indefinite time: but this is now altered, as will be shewn in the next Chapter.

And be certain and reasonable. 2 Roll. Ab. 265. Hob. 107.

28. A prescription must be certain; therefore a prescription to pay for tithes a penny or *thereabouts*, for every acre of arable land is bad. It must also be reasonable: thus a prescription for setting out tithes, without the view of the parson, is void; as being unreasonable. But a prescription may be reasonable, though it be unusual or inconvenient; as for a person to have a way over a churchyard, or through a church.

Dewell v. Sanders, Cro. Jac. 491. Fowler v. Sanders, Ib. 446.

29. A person cannot prescribe to do a wrong, or any thing that would be a nuisance to others; as to erect a dove-cote or pigeon-house on his lands, if it be a nuisance; or to lay logs of wood in the highway, and suffer them to continue there for a long time; for this is also a nuisance.

1 Inst. 115 a.

30. There can be no prescription against an act of parliament; because that is the highest proof and matter of record in law: but a man may prescribe against an act of parliament, when his prescription is saved or preserved by another act of parliament.

Idem.

31. Lord Coke says, there is a diversity between an act of parliament in the negative, and in the affirmative; for an affirmative act does not take away a custom. Moreover, there is a diversity between statutes that are in the negative: for if a

statute in the negative be declaratory of the ancient law, that is, in affirmance of the common law, there, as well, a man may prescribe or allege a custom against the common law; so a man may do against such statute; for *consuetudo privat communem legem.*

32. Mr. Hargrave has observed upon the above passage, that this appears to be a good rule; for if a statute is merely declaratory of the common law, the latter should be construed as it was before the recognition by parliament; consequently its operation should not be extended to the destruction of prescriptions and customs, which were before allowable. As to the use of negative words in such a case, they might either arise from the subject, or be a mode of expressing what the common law was; in either of which cases there could not be any colour of reason for giving more effect to negative, than belonged to affirmative words. In short, to say that a statute merely declaratory of the common law, being expressed in the negative words, should operate on subjects to which the common law was not applicable, seemed to be a direct contradiction:—for how could a statute be merely declaratory, if it was in any degree introductive of a new law. However there were books in which Lord Coke's distinction, in respect to negative statutes declaratory of the common law, was denied. Idem, note. W. Jones, 270, 271. 289.

If those who opposed his opinion had meant only to say, that in the instances by which he illustrated this rule, the negative words of the statutes not only imported something more than a declaration of the common law, but were also intended to annihilate all particular customs clashing with it; or that on other accounts the instances were not apt; there might possibly be some colour for their dissenting from Lord Coke: but what was professed to be controverted was the distinction itself, which, as he understood it, seemed to be perfectly unexceptionable.

33. Lord Coke says, the statute 34 Edw. 1. provides that none shall cut down any trees of his own within a forest, without the view of the forester: but inasmuch as this act was in affirmance of the common law, a man may prescribe to cut down his woods, within a forest, without the view of the forester. This doctrine has been frequently denied: but is defended by Mr. Hargrave, with his usual learning and ability. 1 Inst. 115 a.

34. A man cannot prescribe against another's prescription; for the one is as ancient as the other: thus, if a man prescribes Aldred's case, 9 Rep. 57. 2 Mod. 105.

for a way, a light, or any other easement, another cannot allege a prescription to prevent the enjoyment of it.

How a prescription may be lost. 1 Inst. 114 b.

35. A prescription may be lost by unity of possession, of as high and perdurable an estate in the thing claimed, and in the land out of which it is claimed by such prescription, because it is an interruption in the right.

4 Rep. 88 a.

36. So where the subject matter of a prescription is destroyed, the prescription is lost: as if the repair of a castle be claimed by prescription, and the castle is destroyed, the prescription is gone.

37. But no alteration in the quality of the thing to which a prescription is annexed will destroy the prescription: as if a person prescribes in a *modus decimandi* for tithes of a park, and the park is disparked, yet the prescription continues; for it is annexed to the land.

Cowper v. Andrews, Hob. 39.

4 Rep. 87 a.

38. So, if a man has estovers by prescription to his house, although he alters the rooms and chambers of it, as to make a parlour where there was a hall, or a hall where the parlour was; and the like alteration, of the qualities, not of the house itself; without making new chimnies; by which no prejudice accrues to the owner of the wood; it is not any destruction of the prescription. Although he builds new chimnies, or makes an addition to the old house, he shall not lose his prescription: but he cannot employ any of his estovers in the new chimnies, or in the part newly added.

Luttrel's case, 4 Rep. 86.

39. A person having two old fulling mills, to which was annexed, by prescription, a right to a water-course, pulled them down, and erected two mills to grind corn. It was resolved, that as the mill was the substance, and the addition demonstrated only the quality, and the alteration was not of the substance, but only of the quality, or the name of the mill, without any prejudice in the water-course to the owner, the prescription remained.

Finch, B. 1. c. 3. s. 23.

40. If a person has liberties by prescription, and after takes a grant of them by letters patent from the King; this determines the prescription: for a matter in writing determines a matter in *fait*.

Ante, s. 25.

41. It has been stated that a prescription must have a continual and peaceable usage and enjoyment; therefore, a prescription may be lost, by neglecting to claim or exercise it.

Descent of prescriptive estates. 2 Comm. 266.

42. Sir W. Blackstone observes, that estates acquired by prescription are not, of course, descendible to heirs general, like other purchased estates, but are an exception to the rule: for, properly speaking, the prescription is rather to be considered as an evidence of a former acquisition, than as an acquisition *de novo*. Therefore, if a man prescribes for a right of way in himself and his ancestors, it will descend only to the blood of that line of ancestors in whom he so prescribes; the prescription in this case being a species of descent. But if he prescribes for it in a *que estate*, it will follow the nature of that estate in which the prescription is laid, and be inheritable in the same manner, whether that were acquired by descent or purchase; for every accessary followeth the nature of its principal.

CHAP. II.

Statutes of Limitation.

SECT. 1. *Negative Prescription.*
4. *Statutes of Limitation.*
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SECTION I.

Negative prescription.

THE second sort of prescription is that which arises from the several statutes of Limitation, in consequence of which no action can be maintained, for the recovery of any real property, after an uninterrupted possession of a certain number of years. It is different from the prescription by immemorial usage; for by that a right is acquired to an incorporeal hereditament: but by this last kind, no positive right or title is acquired, but only the remedy for the recovery of either a corporeal or incorporeal hereditament is taken away; from whence it may be properly called a negative prescription. And in a modern case, the Court of King's Bench said, the statutes of Limitation operated as an extinguishment of the remedy of the one, not as giving the estate to the other.

Davenport v. Tyrrel, Tr. 19.

2. This kind of prescription is as ancient as that which arises from immemorial usage. Thus we read in Bracton:—*Longa*

enim possessio (sicut jus) parit jus possidendi, et tollit actionem vero domino, quandoque unam, quandoque aliam, quandoque omnem. Quia omnes actiones in mundo, infra certa tempora, habent limitationem.

3. By the old law no seisin could be alleged by the demandant in a real action, but from the time of King Henry I. By the statute of Merton, 20 Hen. 3. the seisin must have been alleged from the time of King Henry II.; and by the statute of Westm. 1. 3 Edw. 1. c. 59. the seisin must have been alleged from the time of King Richard I. 1 Inst. 114 b. s. 3. 2 — 94, 238.

4. The period established by the last of these statutes increased every day, till at last there was scarce any limitation at all; so that it became necessary to fix a certain time within which a claim to lands and tenements must be made, and beyond which an uninterrupted possession became a good title, by operating as a bar to every kind of action. This was effected by the statutes 32 Hen. 8. c. 2. and 21 Ja. 1. c. 16. which were made for the purpose of quieting the titles to estates, and avoiding suits; and have therefore been called statutes of repose. Statutes of Limitation. 3 Comm. 189.

5. The first section of the statute 32 Hen. 8. enacts, "That no manner of person or persons shall sue, have, or maintain any writ of right (*a*), or make any prescription, title, or claim of, to, or for any manors, lands, tenements, rents, annuities, commons, pensions, portions, corrodies, or other hereditaments, of the possession of his or their ancestor or predecessor; and declare and allege any further seisin or possession of his ancestor or prede- As to writs of right.

(*a*) [By the stat. 3 & 4 Will. 4. c. 27. s. 36. it is enacted, that no real and mixed actions shall be brought after the 31st December, 1834, with the exception of those founded on a writ of right of dower, a writ of dower *unde nihil habet*, a *quare impedit*, and an ejectment, and also, except a plaint for freebench or dower: consequently the the writ of right above mentioned, and all other writs upon which real and mixed actions were founded, cannot, with the above exceptions, be brought, after that day, by any person then having a right of *entry*. By the 37th section a further period of six months is allowed to those who, on the 31st day of December, 1834, shall have a right of *action*, but who shall not have a right of *entry*. By the 38th section, the rights of persons are saved who should be entitled on the 1st day of June, 1835, to real actions only (their right of entry having been taken away by descent cast, discontinuance, or warranty), and they are empowered to maintain their writ or action after the 1st day of June, 1835, but only within the period during which, by the provisions of the act, they might have made an entry upon the land, if their right of entry had not been so taken away.]

cessor, but only of the seisin or possession of his ancestor or predecessor which shall be seised of the said manors, &c. within threescore years next before the *teste* of the same writ."

Dally *v.* King, 1 H. Black. 1.

6. In consequence of this clause, a writ of right could not be maintained by any person without shewing an actual seisin, taking the *esplees* or profits, either in the demandant himself, or the ancestor under whom he claimed, within sixty years.

As to prescriptive rights.

7. As to incorporeal hereditaments, acquired by immemorial usage, the clause which has been just stated extends to them; therefore, nothing could be claimed by prescription without shewing a possession within sixty years.

As to avowries.

8. By the 4th section of this statute, it is enacted, "That no person or persons shall make any avowry or cognizance for any rent, suit, or service, or allege any seisin of any rent, suit, or service, in the same avowry or cognizance, in the possession of his or their ancestors, or predecessor or predecessors, or in his own possession, or in the possession of any other, whose estate he shall pretend or claim to have, above fifty years next before the making of the said avowry or cognizance."

Statute at large, edit. 1816, fol.

This section only extends to rent, suit, and service; and not to such services as may not accrue within the time limited in it, of which an account will be given hereafter.

Bevil's case, 4 Rep. 6.

9. In the two sections of this statute which have been stated, the word *seisin* is used generally and indefinitely. But it has been resolved, that as to a writ of right, it shall be intended of an actual seisin; and as to avowries, it shall extend to a seisin in law, as well as to a seisin in fact.

As to writs of *formedon*.

10. By the statute 21 Ja. 1. c. 16. s. 1. it is enacted, "That all writs of *formedon in descender*, *formedon in remainder*, and *formedon in reverter* (*a*), of any manors, lands, tenements, or other hereditaments whatsoever, at any time thereafter to be sued or brought, by occasion or means of any title or cause thereafter happening, shall be sued or taken within twenty years next after the title and cause of action first descended or fallen; and at no time after the said twenty years."

3 Brod. & Bing. 217.

11. [Until the recent case of Tolson *v.* Kaye,] it was not determined whether, under this statute, a person claiming an

(*a*) [These writs are abolished by the stat. 3 & 4 Will. 4. c. 27. ss. 36, 37, 38. Vide supra, note to sect. 5. of this chapter.]

estate tail by descent, was barred by the neglect of the preceding person, entitled to the estate tail, in not making an entry, or bringing a writ of *formedon*, within twenty years from the time when his title accrued. It was contended that he was not barred, because the issue in tail did not take in the character of heir to their immediate predecessor, but as issue of the body of the first donee, and described as such in the original gift of the estate tail, and were therefore not affected by any act of their ancestors. That where a person became entitled to an estate tail, as son, nephew, or cousin, to the person last seised of it, a new title and cause of action first descended to him, as issue of the original donee; and so he was within the letter of the statute, and had a new period of twenty years to bring his *formedon*.

Tit. 29. c. 5. 1 Inst. 15 b. 3 Rep. 41 b. 1 P. Wms. 721. 2 Ves. 634.

That although a tenant in tail might bar his issue by fine, in consequence of the statutes made for that purpose; and by a common recovery, on account of the supposed recompence in value; yet that, if he did not avail himself of these modes of barring his estate, it was still within the protection of the statute *De Donis;* and he could not by any other positive act of his, or by his *laches*, destroy the rights of those who became entitled to it after his death.

Tit. 35, 36.

12. The general opinion however was, that in consequence of the words *first descended*, if a person entitled to an estate tail neglected to bring his writ of *formedon* within twenty years after his title first descended, he and also his issue would be barred; for if the issue brought a *formedon*, it might be answered that the title first descended to his ancestor or predecessor upwards of twenty years before. And this construction was confirmed by the opinion of a majority of the judges in the case of Stowell *v.* Zouch, in which two of the judges said, that if a tenant in tail was disseised, and the disseisor levied a fine, and five years passed, and afterwards the tenant in tail died, the issue in tail should have a new period of five years to make his claim, for a new right came to every one of them *per formam doni*. But this was utterly disavowed by Dyer and Catline, C. J., and all the other judges, who said that the word *first*, which ought to be added to the word *descend*, would not suffer every descent to have five years.

Plowd. 374.

That as the words of the statute of Fines, 4 Hen. 7. upon

Tit. 35. c. 11.

which the above opinion of the majority of the judges was founded, were nearly similar to those of the statute 21 Ja. 1. it might be fairly presumed, that the judges would now adopt this reasoning; and give the same effect to the words *first descended*, in the stat 21 Ja. 1. as in the statute of Fines. (*a*)

[Since the preceding observations were written, the case of Tolson v. Kaye has decided that the twenty years, within which a *formedon* in the *descender* ought to be brought under the stat. 21 Ja. 1. c. 16. begin to run when the title descends to the first heir in tail, unless he be under disability.]

13. The word *fallen* in the stat. 21 Ja. 1. is clearly applicable to estates in remainder and reversion; and it has been always held that writs of *formedon* in remainder and reverter may be brought at any time within twenty years after the determination of the preceding estate tail, though such preceding estate tail should have continued for centuries; because by such determination the title and action *first descended* and fell.

As to entry upon lands.

14. It is further enacted by the statute, "that no person or persons shall at any time thereafter make any entry into any lands, tenements, or hereditaments, but within twenty years next after his or their right or title, which should thereafter first descend or accrue to the same; and in default thereof such persons so not entering and their heirs shall be utterly excluded and disabled from such entry after to be made." (*b*)

Widdowson v. Earl of Harrington, 1 Jac. & Wal. 532.

(*a*) In Cotterell v. Dutton, 4 Taunt. 826. Mr. J. Heath held, that there was no such difference between the issue in tail and other heirs as was supposed.—*Note to former edition.*

(*b*) [By stat. 3 & 4 Will. 4. c. 27. s. 2. it is enacted that after the 31st day of Dec. 1833, no person shall make an entry or distress, or bring an action to recover any land or rent, but within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to some person through whom he claims, or if such right shall not have accrued to any person through whom he claims, then within twenty years next after the time at which the right to make such entry or distress, or to bring such action shall have first accrued to the person making or bringing the same. The next section explains when rights shall be deemed to have accrued in the following words: "That in the construction of this act the right to make an entry or distress, or bring an action to recover any land or rent, shall be deemed to have first accrued at such time as hereinafter is mentioned, (that is to say,) when the person claiming such land or rent, or some person through whom he claims, shall in respect of the estate or interest claimed, have been in possession or in receipt of the profits of such land, or in receipt of such rent, and shall while entitled thereto have been dispossessed, or have discontinued such possession or receipt, then such right shall be deem-

15. Under this clause all persons must enter within twenty years after their title accrues; and all those who are entitled to estates tail in remainder, or to reversions in fee simple expectant on the determination of estates tail, must enter within twenty years after the determination of such estates tail; because their title first accrues by such determination. (*c*)

16. An entry can only be made where there is an existing right of possession; for where that is lost, the right of entry is gone. Thus where an estate tail was discontinued,(*d*) the estates in remainder, and the reversion expectant thereon, were devested; and the issue in tail, as also the persons entitled to the estates in remainder, and to the reversion were barred of their entry, but not of their real action. Tit. 29. c. 1. s. 6. Tit. 2. c. 2.

17. A right of entry might also be destroyed by a descent, (*e*) unless the heir laboured under any of the disabilities which will be mentioned hereafter. But by the stat. 32 Hen. 8. c. 33., which has been already stated, it is enacted, that a descent from Lit.. s. 385. Tit. 29. c. 1. s. 7. 1 Inst. 111 a. 240 b. Carter v. Tash, 1 Salk. 241.

ed to have first accrued at the time of such dispossession or discontinuance of possession, or at the last time at which any such profits or rent were or was so received; and when the person claiming such land or rent shall claim the estate or interest of some deceased person, who shall have continued in such possession or receipt, in respect of the same estate or interest, until the time of his death, and shall have been the last person entitled to such estate or interest, who shall have been in such possession or receipt, then such right shall be deemed to have first accrued at the time of such death; and when the person claiming such land or rent shall claim in respect of an estate or interest in possession, granted, appointed, or otherwise assured, by any instrument (other than a will,) to him, or some person through whom he claims, by a person being, in respect of the same estate or interest in the possession or receipt of the profits of the land or in the receipt of the rent, and no person entitled under such instrument shall have been in such possession or receipt, then such right shall be deemed to have first accrued at the time at which the person claiming as aforesaid, or the person through whom he claims became entitled to such possession or receipt, by virtue of such instrument; and when the estate or interest claimed shall have been an estate or interest in reversion or remainder, or other future estate or interest, and no person shall have obtained the possession or receipt of the profits of such land or the receipt of such rent in respect of such estate or interest, then such right shall be deemed to have first accrued at the time at which such estate or interest became an estate or interest in possession; and when the person claiming such land or rent, or the person through whom he claims, shall have become entitled by reason of any forfeiture or breach of condition, then such right shall be deemed to have first accrued when such forfeiture was incurred, or such condition was broken.]

(*c*) [See the conclusion of section 3 of stat. 3 & 4 Will. 4. c. 27. and sect. 5. ib.]

(*d*) [By the 39 section of the above act, it is enacted, That no descent cast, discontinuance, or warranty, which may happen, or be made after the 31st day of Dec. 1833, shall toll or defeat any right of entry or action for the recovery of land.]

(*e*) Ib.

a disseisor shall not have that effect, unless he had been in peaceable possession for five years next after the disseisin.

1 Inst. 256 a. Id. 238 a.

18. Lord Coke says, this statute does not extend to any feoffee or donee of the disseisor, mediate or immediate; and that abators and intruders are out of it, because it is penal. It followed, that the descent of an estate from an abator or intruder to his heir, took away the entry of the person having right, and put him to his real action.

1 Inst. 240 b. Doe v. Danvers, infra.

If a person seised of lands in fee devised the same to a stranger in fee, and died, by which the freehold in law was cast upon the devisee, and the heir of the devisor entered and died seised, this descent should not take away the entry of the devisee; for, as Lord Coke observes, he would then be utterly without remedy. But he must enter within twenty years, because a writ of right did not lie for a devisee.

Tit. 1. s. 23. 1 Saund. R. 319 n.

19. It is laid down by Mr. Serjeant Williams, that an actual entry is not required to avoid the statute of Limitations; for if an ejectment be brought within twenty years, no previous actual entry seemed necessary. (*a*)

Effect of a twenty years' possession.

20. In consequence of the statute 21 Jac. 1. a peaceable possession for twenty years takes away the right of entry of all persons who are not within the savings of the act; and in such case a release of all actions, from the person entitled to the right

Jenk. 16.

of property, will create a good title; for no writ of right can be maintained for the fee simple after such a release.

Stocker v. Berny, 1 Ld. Raym. 741. 2 Salk. 421. 685.

21. An uninterrupted possession for twenty years not only gives a right of possession which cannot be divested by entry, but also gives a right of entry. So that if a person who has such a possession is turned out of it, he may lawfully enter, and bring an ejectment for its recovery; upon which he will be entitled to judgment. Thus a possession for twenty years, in this case, forms a positive prescription.

The possession must be adverse.

22. The [former] statutes of limitation never ran against any person, unless he was actually ousted or disseised. Thus it was laid down in a case respecting the statute of Fines, which is in

(*a*) [By sect. 10. stat. 3 & 4 Will. 4. c. 27. it is enacted that no person shall be deemed to have been in possession of any land within the meaning of that act, merely by reason of having made an entry thereon: and by section 11. that no continual or other claim upon, or near, any land, shall preserve any right of making an entry or distress, or of bringing an action.]

fact a statute of Limitation, that he who had the estate or interest in him could not be put to his action, entry, or claim: for he had that which the action, entry, or claim, would vest in or give him. And it was not only necessary that the person should be out of possession, but it was also necessary that the possession should be adverse to, and inconsistent with, the title of the claimant. (*b*) Tit. 35. c. 13. Doe *v.* Reed, 5 Barn. & Ald. 232. Doe *v.* Pike, 3 B. & Adol. 738.

23. Where a person has conveyed away the legal estate in lands to a trustee for himself, for any particular purpose, and continues to hold the possession, he becomes tenant at will to such trustee; and his possession not being adverse to the title of the trustee, the statute of Limitations will not operate in such a case. (*c*) Keene *v.* Deardon, 8 East. 248.

24. Joint tenants, coparceners, and tenants in common, having a joint possession and occupation of the whole, [previously to the late statute of Limitations,] it was settled that the possession of any one of them was the possession of the others, or other of them, so as to prevent the statutes of Limitation from affecting them; nor would the bare perception of all the rents and profits by one operate as an ouster of the other. (*d*) Vide Tit. 18, 19, 20. 3 & 4 Will. 4. c. 27.

25. In ejectment, on a trial at bar, the statute of Limitations was insisted on: but it was ruled by the Court, that the possession of one joint tenant was the possession of the other, so far as to prevent the statute of Limitations. The same point was determined as to coparceners, in the case of Davenport *v.* Tyrrel, and as to tenants in common, in the case of Fairclaim *v.* Shackleton, which have been already stated. Ford *v.* Grey, 1 Salk. 285. 6 Mod. 44. Tit. 19 & 20.

26. A person being seised in fee, having two daughters, devised his lands to his grandson, by his eldest daughter, in fee. The grandson died without issue. The heir of the grandson and the heir of the coparcener entered into the land, and took the profits by moieties, for twenty years together, upon the supposition that the devise was void for a moiety. The mistake being discovered, the heir of the grandson brought an ejectment against the heir of the other coparcener. Upon a special verdict, it was Reading *v.* Royston, 2 Salk. 423.

(*b*) [See sections 20, 21, 22, 23, 24 of statute 3 & 4 Will. 4. c. 27.]

(*c*) [See section 25 of the same statute.]

(*d*) [But now by the 12th section of the act it is enacted, that the possession of one or more of several coparceners, joint-tenants, or tenants in common, shall not be deemed the possession of the others.]

objected, that the bringing the ejectment against the heir of the coparcener for this moiety admitted the plaintiff to be out of possession for twenty years, and then he was barred by the Statute of Limitations.

The Court, however, laid it down, that the statute of Limitations never runs against a man, but where he is actually ousted or disseised; and true it was, one tenant in common might disseise another: but then it must be done by actual disseisin, and not by bare perception of the profits only (*a*).

27. Where lands are held by the rector of a parish, as a compensation for tithes, this will not be considered as an adverse possession.

Roe v. Ferrars, 2 Bos. & Pull. 542.

28. In ejectment a verdict was found for the plaintiff, subject to the opinion of the Court, whether the plaintiff's right of recovery was not barred by the statute of Limitations. The lessors of the plaintiff, who were lords of the manor of Beddington, in Surry, sought to recover the lands as parcel of the manor, against the defendant, who was rector of the parish, and claimed them as parcel of the rectorial glebe. The lords of the manor had a right of presentation to the rectory, and were also entitled to a portion of the tithes. At various times there had been a mutual exchange of lands and tithes between the lords of the manor and the rectors, which had given rise to much confusion, concerning their respective rights. To prove possession in the lessors of the plaintiff, a deed was produced, dated in 1703, by which the then lord of the manor demised to the rector the lands in question for forty years, reserving a certain rent; and the rector covenanted with the lessor, that he and his heirs should have the tithe of oats of the parish. The rectors continued to hold the possession after the expiration of the lease, but withheld the rents for upwards of twenty years: the lords of the manor continued to take the tithe of oats.

The Court was of opinion, that possibly, at the time when the rent was withheld, it was agreed between the then rector and the lord of the manor, that if the latter were permitted to receive the tithe as before, the former should be permitted to retain the land demised; therefore that the possession of the land by the rector was not adverse, so as to let in the operation of the statute of Limitations.

Vide Doe v. Perkins, Tit. 35. c. 14.

(*a*) See note (*d*), section 24, *supra*.

29. [Previously to the statute 3 & 4 Will. 4. c. 27,] where there was a valid existing lease, the right of entry was postponed till such lease was determined; because the right to the possession first descended or accrued upon the determination of the lease. Nor was the plaintiff, in such case, obliged to shew that he had received any rent on the lease. (*a*)

A lease postpones the right of entry.

30. In ejectment for lands at Deptford, in Kent, the lessor of the plaintiff claimed the estate as heir at law to John and Edmund Walthew, who had granted long leases of the premises, reserving rent. The leases expired in 1789, on which one Elizabeth Ellerbeck had entered in the name of herself and the lessor of the plaintiff; and Mr. Maddox, the defendant, had brought an ejectment, claiming not only by an assignment of the lease, under which he had got into possession, but also by a conveyance of the reversion by lease and release, from the heirs of Dame Elizabeth Blundell; who, he stated, was the heir of John and Edmund Walthew.

Orrell *v.* Maddox, Runn. Eject. App. No. 1. p. 458, ed. 1795.

Maddox recovered the premises at Maidstone in 1791; and Mrs. Ellerbeck being thrown into gaol for the costs, died there: but her sister made an entry, and brought an ejectment; which was tried before Mr. Baron Hotham at Maidstone, in 1794, where she proved her right, as heir of John and Edmund Walthew.

For the defendant it was objected, that supposing the pedigree sufficiently proved, as there was a rent reserved on the leases, the lessor of the plaintiff was bound to shew that she herself or some of the ancestors from whom she derived her title and descent, had received the rent within twenty years previous to the commencement of the action; the judge thinking *that* was necessary to prove a possessory title, the rent being in lieu of the land, considered the objection as fatal, and upon it nonsuited the plaintiff.

Mr. Serjeant Bond (from whose manuscript this case was taken) moved to set aside the nonsuit. He said it was a general

(*a*) [But by the 9th section of 3 & 4 Will. 4. c. 27. the right of the person entitled to the land, to make an entry or distress, or to bring an action, shall be deemed to have first accrued at the time at which the rent (of twenty shillings or upwards,) reserved by such lease was first received by the person wrongfully claiming: and no right shall be deemed to have first accrued, upon the determination of such lease, to the person rightfully entitled. See also sections 7 and 8 of the above act.]

question whether a person seised of a reversion expectant on a term for years, was bound, in order to entitle himself to recover in ejectment, to shew, *as part of his case*, that he had actually been possessed, within any particular limits, of the rents reserved upon the leases. It would be admitted that if nothing was reserved, he could not be expected to shew that any thing was received: but as fealty was at least the implied service in all tenancies, if no rent, the party must shew he had received fealty; or if a pepper-corn was only reserved, he must prove seisin of it. Nothing of this was to be found in the statute of Limitations, 21 Ja. 1.; that alone could have given birth to this rule, which only directed that the entry must be made within twenty years after the title accrued; and as ejectment only lay where the title of entry was found, it could only be brought within twenty years. That here the leases expired in 1789; consequently the ejectment being brought within twenty years after the title accrued, the statute was satisfied: he concluded that all reference or analogy to this statute was false, and there was no rule of law which authorized the defendant's objection. If the rent had not been received, the same statute had taken away the remedy by action of debt, after six years, but not the right. The right remained to the rent; and, according to Foster's case, the older Statute of Limitations did not apply to a rent reserved by deed. The fact of payment was not a requisite or direct point to be proved in this action: he did not undertake to make out that he was entitled to the rent; he only was to shew he was entitled to the possession, the term being elapsed.

Bro. Ab. Esplees, 5.

In real actions sometimes esplees were part of the demandant's case, as in a writ of right: but in others, as in *cessavit* or escheat, where they claimed a seigniory or reversion, none were alleged. That non-receipt of rent in that line of descent, in which plaintiffs claimed, might operate as a consideration or presumption for the jury to go on, and lead them to suppose the right was not in the plaintiff: but if the defendant had shewn this, the plaintiffs might have rebutted such a presumption by evidence in reply. That, at all events, not receiving the rent was only a question for the jury, and could not warrant a nonsuit, as if it was as necessary a requisite, as proof of a conversion in trover, or of esplees in a writ of right.

The Court set aside the nonsuit, Lord Kenyon going very much on Bond's argument.

31. Thomazine Taylor being tenant in fee simple of a customary estate, held of the manor of Stepney, demised the same to D. Whiting for forty-one years, with a proviso for re-entry on non-payment of the rent. The lessor died in 1780, and in 1782, Thomas Danvers was admitted as her heir to the said premises. Doe *v.* Danvers, 7 East. 299.

The plaintiff claimed under the will of T. Taylor; but though the testatrix died in 1780, and the will was established in 1782, yet owing to the lease, which did not expire till June 1800, the devisee did not enter or bring an ejectment till Hil. Term 1802; but suffered the heir at law of the testatrix, who was admitted to the premises, and afterwards the defendant his son, to whom they descended in 1791, to take the rent during the intermediate time; and this though there was a proviso in the lease for re-entry in case of non-payment of rent.

It was contended on behalf of the defendant, that taking this to be freehold, the lessor of the plaintiff was barred by his laches; and it was no answer to say that the outstanding lease, which continued to run till Midsummer 1800, prevented his entry before; for it was still competent to him to have entered, without committing a trespass; as to demand rent or fealty, or to obtain seisin of the freehold.

Mr. Justice Lawrence.—"Must not an entry, to avoid the statute of Limitations, be an entry for the purpose of taking possession; and how could the lessor have lawfully entered for that purpose during the continuance of the lease?"

If this were so, a right of entry might be preserved, even after an ouster of the rents and profits for above sixty or one hundred years, which would entirely defeat the object of the statute, which was to quiet men's possessions; and it would be incongruous to hold that an ejectment might be maintained, after a real action was barred by length of time; and that such an effect should be produced by a tenancy from year to year, or even a tenancy at will. The tenant in possession according to Taylor *v.* Horde, enjoyed as the covenanted bailiff of the tenant of the freehold; and as a recovery of a term did not displace the freehold, so, according to Lit. s. 411, there might be a disseisin of the freehold, pending the term, which should be no ouster of the term: but Taylor *v.* Horde shewed that a mere entry on the land 1 Burr. 113. Tit. 36. c. 5.

for another purpose did not operate as a disseisin of the tenant in possession, so as to make a good tenant to the *præcipe*.

Lord Ellenborough.—" Disseisin is said to be a personal trespass, a tortious ouster of the seisin of another; and in Salk. 256. Lord Holt says, that there can be no disseisin without an actual expulsion. But can you shew that the devisee could have entered to vest the seisin in herself, without committing a trespass upon the tenant in possession? because the law does not require a person to do that, which would make him a wrong doer."

She might have had a writ of entry during the continuance of the lease, for the purpose of asserting and establishing her right. Ouster of seisin was distinct from ouster of possession. Receipt of rent by a stranger was a disseisin, yet there was no ouster of possession; and at any rate there might have been a symbolical delivery of customary lands in lease, by admittance, subject to the lease. Besides, the devisee might have brought a real action, wherein the judgment is, *ut haberet seisinam, &c.* without saying any thing of the possession; and there the demandant counted on his seisin, and not upon possession, as in ejectment. If the fact of the lands being in lease did not bar the seisin of the owner, there was no reason why it should bar his entry, for the purpose of giving him seisin. The devisee might have justified, in trespass brought by the tenant, that she entered in order to vest the seisin in herself, or to assert her right, whatever it might be, against the party claiming and taking the rent, and not to oust the tenant; she might also have entered to distrain for the rent; and at all events, as there was a clause in the lease for re-entry, in default of payment of the rent, the devisee might have availed herself of the forfeiture, to enter and keep possession, above twenty years before.

The statute of Limitations had always been construed favourably, with a view to quiet possessions; and the question whether receipt of rent by one tenant in common for above twenty years were an ouster of his companion, could never have occurred, if an adverse receipt of rent for such a length of time had not been considered as a bar. Now here the defendant, and his father before him, had an adverse possession, by receipt of the rent, for above twenty years; which was not only a bar to the lessor's remedy by ejectment, but gave the defendant a title to to the possession, from whence he could only be removed by a

real action; and this distinguished the case from that of Orrell v. Maddox, where the only question was whether it were necessary for the lessor of the plaintiff to shew a receipt of rent within twenty years, on an outstanding lease; which was holden not to be necessary. Ante, s. 30.

On the part of the lessor of the plaintiff it was insisted, that no other right or title of entry was within the statute of Limitations, except that which was accompanied by a right of possession, which the lessor could not have, pending the lease; and the payment of the rent during part of the time to the defendant and his father would not of itself make the holding of the tenant wrongful; but it still continued legal under the original term, as the lessor was not bound to take advantage of the forfeiture, and re-enter for the condition broken. The Court was of this opinion, and gave judgment for the plaintiff. See Bushby v. Dixon, 3 Bar. & Cress. 298. 304—5.

32. But if a lease were void, or considered as a trust for the person entitled to the inheritance, it would not, in that case, postpone the right of entry. See sect. 29. supra, note.

33. By an indenture of settlement made in the year 1668, the estates in question were limited to the use of Sir Robert Atkyns the elder, for life, remainder to Sir R. Atkyns the younger, and the heirs male of his body by his then intended wife, remainder to the right heirs of Sir R. Atkyns the elder; with a power to Sir R. Atkyns the elder, and Sir R. Atkyns the younger, when they should be respectively in possession, to demise the said premises to any person or persons, for one, two, or three lives, reserving the usual rents; and also a power to Sir R. Atkyns the father to limit the premises to the use of any woman he should marry for her life, by way of jointure. Sir R. Atkyns the father, in 1681, made an appointment of the premises by way of jointure to Ann Dacres for her life, and soon after married her. Taylor v. Horde, 1 Burr. 60.

Sir R. Atkyns the father, by indenture dated in 1698, under his hand and seal, attested by three witnesses, and made between himself of the one part, and Thomas Dacres, R. Dacres, and J. Dacres, of the other part, reciting his power of leasing, in consideration of the rent reserved, and in pursuance of the said power, demised the premises, to Thomas, Robert, and John Dacres, and their assigns, for and during their natural lives, and the life of the longer liver of them, reserving a yearly rent of 360*l.*, in which lease was contained the following clause:—

"The true intent and meaning of this estate or term for lives, so hereby granted and made to the said Thomas Dacres, R. Dacres, and J. Dacres, and the survivor of them, being to preserve the said remainder so limited in the premises, by the said recited indenture, to the right heirs of the said Sir Robert Atkyns the father, and to such person or persons to whom the said Sir Robert Atkyns shall any way dispose of the same, from being barred by any recovery to be suffered, or by any other act to be attempted or done, for the barring of the same."

John Dacres alone executed a letter of attorney reciting the said lease, and empowered Thomas Barker to take livery of the premises from Sir Robert Atkyns the father, for himself and for Thomas and Robert and every of them in their names, and for their use, according to the purport of the said indenture; and to enter and take possession of the said premises, to the use of them and every of them.

Sir R. Atkyns delivered seisin of the premises to Barker, to the use of Thomas, Robert, and John Dacres: but the lessees were never in possession of the premises otherwise than by the said livery; nor did they ever receive or pay any rent, in respect of the said premises; and the lease was not found in the custody of Thomas Dacres, the surviving lessee, at the time of his death.

Sir R. Atkyns the father made his will in 1708, whereby he devised his reversion in fee in the premises in question, and also the lease made to the Dacres, to John Tracy, the lessor of the plaintiff, who afterwards took the name of Atkyns, in tail, with with several remainders over; and died in 1709, whereupon his widow entered on the premises, claiming the same for her life as her jointure.

Sir R. Atkyns the younger brought an ejectment against his father's widow, for the recovery of the premises in question; when a verdict was found for the plaintiff, and judgment entered up accordingly. Soon after which, Sir Robert Atkyns the son entered into and was in possession of the premises, and by feoffment conveyed the same to a tenant to the *præcipe*, and suffered a common recovery.

Sir R. Atkyns continued in possession till November 1711, when he died without issue male.

Robert Atkyns who was nephew and heir at law of Sir R.

Atkyns, the son, entered into the premises, upon the death of Dame Ann Atkyns, the widow of Sir R. Atkyns the father, who had recovered the premises in ejectment, as her jointure.

Robert Atkyns died in possession in 1753; and Thomas Dacres, the survivor of the three persons named in the lease, died in 1752.

John Atkyns the lessor of the plaintiff never was in possession of the premises till 1752, when he entered, claiming as devisee under the will of Sir Robert Atkyns the father, and demised to the plaintiff.

Two great questions arose upon this case: 1st, Whether the recovery was good. 2dly, Whether, supposing the recovery was bad, the plaintiff was barred by the statute of Limitations.

The Court of King's Bench being of opinion that the recovery was bad, it then became necessary to determine whether the lessor of the plaintiff had made an entry within twenty years after his title accrued; for otherwise he was barred of his remedy by the statute of Limitations. Vide Tit. 36. c. 2.

Lord Mansfield delivered the opinion of the Court. He said, an ejectment was a possessory remedy, and only competent when the lessor of the plaintiff might enter; therefore it was always necessary for the plaintiff to shew that his lessor had a right to enter, by proving a possession within twenty years, or accounting for the want of it, under some of the exceptions allowed by the statute. Twenty years' adverse possession was a positive title to the defendant. It was not a bar to the action, or remedy of the plaintiff only, but took away his right of possession. Every plaintiff in ejectment must shew a right of possession, as well as of property; therefore the defendant need not plead the statute as in the case of actions. The question then was, whether it appeared that the lessor of the plaintiff might enter when he brought the ejectment. Sir R. Atkyns died without issue male in 1711, and in 1712 Lady Atkyns the jointress died. Then accrued the title of the lessor of the plaintiff; his only excuse for not entering was, that he was prevented by the lease to the three Dacres. That upon the death of Thomas Dacres, the surviving lessee, in 1752, a new title of entry accrued, upon which he entered and brought his ejectment. Three answers were given, any one of which, if well founded, was sufficient. 1. That the lease was absolutely void, and of no effect. 2. If

good, it determined by the estate tail being spent, by the express tenor of the demise. 3. If subsisting, yet upon the extinction of the estate tail, it was a trust to attend the inheritance in the lessor of the plaintiff, and made part of his title deeds; therefore could not stop the statute's running to protect an adverse possession, nor give him any new right of entry.

1. That the lease was void. Sir R. Atkyns the father being only tenant for life, could by virtue of his ownership make no estate to continue after his death: this lease, therefore, after his death could only be supported by his power, if it was made pursuant to it. It was no lease at all: the very definition of a lease was, a contract between landlord and tenant, by which both were bound in mutual stipulations. It professed being made by Sir R. Atkyns on the one part, and the three Dacres on the other part, but it was not; the Dacres were not bound, they never executed it, or any counterpart. It did not appear they knew or consented to the making of it. The deed never was out of Sir R. Atkyns, own possession. It was not found that the best rent was reserved, nor was there a covenant for payment of the rent.

Vide Tit. 32. c. 15.

2. Supposing this pocket undelivered grant of the ideal incorporeal freehold a good execution of the power, it was argued that it determined with the estate tail; the only cause of the grant being, to preserve the reversion during the estate tail, which qualified the grant, and amounted to a limitation; there being no technical words necessary to express a contingency upon which an estate for lives might sooner determine. The deed might have said expressly, "If the heirs male of Sir Robert Atkyns the son continue so long," or, "that the lease should determine, if during the lives the estate tail should be spent:" and the intent of the deed, plainly expressed, was tantamount.

3. Suppose it subsisted; it was as a trust, and disposed of as such, to attend the inheritance of the lessor of the plaintiff, which came into possession in 1712, when his title and right of entry accrued. The lease was one of his muniments; a mere weapon in his hands: and it would be going a great way to say that such a form should take from an adverse possession the benefit of the statute. But the Court was clear, that at the trial a surrender of such a lease might and ought to be presumed, to

let in the statute of Limitations. The special verdict not having found such surrender, the Court could not come at the justice of the case in that shape. It was unnecessary to go into that point, or the former; and it would be very improper unnecessarily to do it. If the Dacres had no estate by virtue of the demise in 1712, then the ejectment was not brought within twenty years after the lessor's title accrued; and no facts were found to excuse him within any of the exceptions. Therefore the Court was unanimously of opinion, that there should be judgment for the defendants.

A writ of error was brought into the House of Lords; and the judges being ordered to attend, the following question was proposed to them:—"Whether sufficient appeared by the special verdict in this case, to prevent the lessor of the plaintiff, by force of the statute of Limitations of the 21st of King James the First, from recovering in the ejectment?" Whereupon the Lord Chief Justice Willes, having conferred with the rest of the judges, delivered their unanimous answer,—"That sufficient did appear by the special verdict in this cause to prevent the lessor of the plaintiff, by force of the statute of Limitations of the 21 Ja. 1. from recovering in the ejectment." Whereupon the judgment of the Court of King's Bench was affirmed. 6 Bro. P. C. 633.

34. [Previously to the late statute of Limitations] where a person acquired a new right, he was allowed a new period of twenty years to pursue his remedy; though he had neglected the first. It being a maxim of law, *Quando duo jura in unâ personâ concurrunt, æquum est ac si essent in diversis.* (*a*) Where, a new right accruing, new entry is given. Plowd. 368.

35. A tenant in tail of lands held in ancient demesne conveyed them by fine, in the court of ancient demesne, to three Hunt *v.* Bourne, 1 Salk. 339. 2 Salk. 421.

(*a*) [By stat. 3 & 4 Will. 4. c. 27. s. 20. the law is now altered, for it is thereby enacted, that when the right of any person to make an entry or distress, or bring an action to recover any land or rent, to which he may have been entitled for an estate or interest in possession shall have been barred by the determination of the period hereinbefore limited, which shall be applicable in such case, and such person shall at any time, during the said period, have been entitled to any other estate, interest, right, or possibility, in reversion, remainder, or otherwise, in or to the same land or rent, no entry, distress, or action, shall be made or brought by such person, or any person claiming through him, to recover such land or rent, in respect of such other estate, interest, right, or possibility, unless in the mean time such land or rent shall have been recovered by some person entitled to an estate, interest, or right, which shall have been limited or taken effect after or in defeasance of such estate or interest in possession.]

persons for their lives. He afterwards levied another fine of the reversion, in the same court, to the use of himself and his heirs.

It was determined, that the first fine created a discontinuance of the estate, and took away the entry of the issue in tail, during the lives of the three persons to whom the first fine was levied, but that the second fine did not make any discontinuance: therefore, although the issue in tail had neglected to bring his *formedon* within twenty years after the death of his ancestor, when his right first accrued, yet when the last life dropped, the discontinuance was determined, and the heir acquired a new right of entry; for the pursuit of which he was allowed by the statute 21 Jac. 1. a new period of twenty years: for when a person has a right, and several remedies, the discharge of one is not the discharge of the other; and the word *right* in the statute means a right of entry.

4 Bro. Parl. Ca. 66. Vide Tit. 35.

Upon a writ of error in the House of Lords, it was contended for the plaintiff—1. That the fine did not create a discontinuance, the consequence of which was, that the right of entry of the issue in tail commenced immediately on the death of the tenant in tail, which happened in 1663, above twenty years before the issue entered: therefore, his entry was barred by the statute of Limitations.

2. That the discontinuance, if any, did not determine with the estate for three lives, but still continued to bar the entry of the issue in tail, by the common law; because a fee passed by the first fine to the cognizee, therefore the discontinuance was of the whole fee: but if the first fine alone did not work a discontinuance in fee, yet the second fine and warranty did, in order that the warranty might be preserved.

3. That the entry was barred by the statute of Limitations, which enacted, that no person should enter into lands but within twenty years after his right or title should first descend or accrue. In this case the first right or title that descended was a right of action, viz. to a *formedon*, which accrued to the issue immediately on the death of the tenant in tail, which happened above thirty-five years before; and the issue having neglected for above twenty years to sue for the estate, was thereby barred, not only of his action, but of his entry also: for otherwise, a man might enter into lands when he had no way by law to recover them,

having lost that remedy by his own default; which would be absurd and inconvenient, with respect to purchasers, and the disturbance of long possessors.

On the other side it was contended, that the only question in the case was, whether the lessor of the plaintiff might lawfully enter, after the determination of the estate for three lives, granted by the first fine; for it was not pretended that a fine, levied in a court of ancient demesne, would bar an estate tail. That the first fine made a discontinuance of the estate, and took away the entry of the tenant in tail, during the lives of the lessees only: but that the grant of the reversion by the second fine did not make a discontinuance in fee; consequently, when the last life dropped, in 1693, the discontinuance was determined, and the right of entry revived; therefore, the issue in tail might lawfully enter, and was not barred by the statute of Limitations, his right not accruing till 1693. The judgment was affirmed.

36. It is said by Lord Hardwicke, that a remainder-man expectant on an estate for life or years, to whom a right to enter, or bring an ejectment, is given by the forfeiture of the tenant for life or years, is not bound to do so: therefore, if he comes within his time, after the remainder attached, it will be good; nor can the statute of Limitations be insisted on against him, for not coming within twenty years after his title first accrued by the forfeiture. (*a*) 1 Ves. 278.

Vide Tit. 35. c. 11.

(*a*) [By sect. 4 of the stat. 3 & 4 Will. 4. c. 27. it is enacted, that when any right to make an entry or distress, or to bring an action to recover any land or rent, by reason of any forfeiture or breach of condition, shall have first accrued in respect of any estate or interest in reversion or remainder, and the land or rent shall not have been recovered by virtue of such right, the right to make an entry or distress, or bring an action to recover such land or rent, shall be deemed to have first accrued, in respect of such estate or interest, at the time when the same shall have become an estate or interest in possession, as if no such forfeiture or breach of condition had happened. And by sect. 5. it is provided, that a right to make an entry or distress, or to bring an action to recover any land or rent, shall be deemed to have first accrued, in respect of an estate or interest in reversion, at the time at which the same shall have become an estate or interest in possession, by the determination of any estate or estates, in respect of which such land shall have been held, or the profits thereof, or such rent shall have been received, notwithstanding the person claiming such land, or some person through whom he claims, shall at any time previously to the creation of the estate or estates which shall have determined, have been in possession or receipt of the profits of such land, or in receipt

How an entry is to be made. Tit. I.

37. The manner of making an entry has been already stated: it has also been resolved, that in proving an entry or claim, to avoid the statutes of Limitation, it is necessary to produce evidence of its having been made upon the lands claimed, unless there be a special reason to the contrary; and also that it was

See stat. 3 & 4 W. ... 4. c. 27. s. 16.

Supr. p. 447.

of such rent. See also ss. 6, 7, 8, 9. By sect. 20 it is enacted, that when the right to an estate in possession is barred, the right of the same person to future estates shall also be barred. By sect. 21. it is enacted, that when the right of a tenant in tail of any land or rent to make an entry or distress, or to bring an action to recover the same shall have been barred by reason of the same not having been made or brought within the period hereinbefore limited, which shall be applicable in such case, no such entry, distress, or action shall be made or brought by any person claiming any estate, interest, or right, which such tenant in tail might lawfully have barred. By sect. 22. it is enacted, that when a tenant in tail of any land or rent, entitled to recover the same, shall have died before the expiration of the period hereinbefore limited, which shall be applicable in such case, for making an entry or distress, or bringing an action to recover such land or rent, no person claiming any estate, interest, or right, which such tenant in tail might lawfully have barred, shall make an entry or distress, or bring an action to recover such land or rent, but within the period during which, if such tenant in tail had so long continued to live, he might have made such entry or distress, or brought such action. And by sect. 23. it is enacted, that when a tenant in tail of any land or rent shall have made an assurance thereof, which shall not operate to bar an estate or estates to take effect after or in defeasance of his estate tail, and any person shall by virtue of such assurance, at the time of the execution thereof, or at any time afterwards, be in possession or receipt of the profits of such land, or in the receipt of such rent, and the same person, or any other person whatsoever, (other than some person entitled to such possession or receipt in respect of an estate which shall have taken effect after or in defeasance of the estate tail), shall continue or be in such possession or receipt, for the period of twenty years next after the commencement of the time at which such assurance, if it had then been executed by such tenant in tail, or the person who would have been entitled to his estate tail, if such assurance had not been executed, would, without the consent of any other person, have operated to bar such estate or estates as aforesaid; then at the expiration of such period of twenty years, such assurance shall be, and be deemed to have been effectual, as against any person claiming any estate, interest, or right, to take effect after or in defeasance of such estate tail. The above act extends to spiritual courts, but not to Scotland, nor to advowsons in Ireland, ss. 43, 44.

It appears doubtful whether the 22d section of the above act will fully answer the purposes for which it is presumed to have been framed. Its effect may be thus illustrated: Suppose a limitation to A. for life, remainder to B. in tail, with remainders over, and a fine levied by B. in 1820: A. dies in 1830; twenty years' possession from the death of A. in 1830, by virtue of this clause, will not, it would seem, bar the remainders expectant on B.'s estate tail; for a *fine* then levied (i. e. at A.'s death in 1830), would not have had the effect of barring the remainders. But if a recovery had been suffered by B. in 1820, without the concurrence of A., it would come within this clause, for at the death of A. in 1830, B. might by *recovery* have barred the remainders over.]

not a casual entry, but made *animo clamandi.* If, however, a person was prevented by force or violence from entering on lands, he must then make his claim as near them as he can, which in that case will be as effectual as if he had made an actual entry.

38. If a person, having a right of entry into a freehold estate, enters upon part of it, such entry will be adjudged good for all possessed by one tenant: but where there are several tenants, there must be entries on each of them. A special entry into a house, with which lands are occupied, claiming the whole, is however a good entry as to the lands. 1 Lill. Ab. 516.

39. On a special verdict, the single question was, whether the entry of *cestui que trust* would be sufficient to avoid the statute of Limitations of 21 Jac. 1. It was held clearly by the whole Court, that such entry was sufficient to avoid the statute; and that they would not hear any argument on the point. Gree *v.* Rolle, 1 Ld. Raym. 716.

40. It is enacted by the statute 4 Ann. c. 16. s. 16., that no claim or entry to be made of or upon any lands, tenements, or hereditaments, shall be sufficient within the statute of Limitations, of 21 Jac. 1. unless upon such entry or claim an action shall be commenced within one year after the making of such entry or claim, and be prosecuted with effect. Must be followed by an action.

41. By the statute 21 Jac. 1. c. 16. s. 2. it is provided, "that if any person or persons that shall be entitled to such writ or writs, or that shall have such right or title of entry, shall be, at the time of the said right or title first descended, accrued, come, or fallen, within the age of twenty-one years, feme covert, *non compos mentis,* imprisoned, or beyond the seas, that then such person and persons, and his and their heir and heirs, shall or may, notwithstanding the said twenty years be expired, bring his action or make his entry, as he might have done before this act; so as such person and persons, or his or their heir or heirs, shall, within ten years next after his and their full age, discoverture, coming of sound mind, enlargement out of prison, or coming into this realm, or death, take benefit of and sue forth the same, and at no time after the said ten years. Savings in the stat. 21 Jac.

42. Upon the construction of this clause, it has been held that the disabilities here mentioned must exist at the time when the right first accrues; for if the time once begins to run, no subsequent disability will avail. Doe *v.* Jones, Tit. 35. c. 11.

Doe v. Jesson, 6 East. 80. Cotterel v. Dutton, 4 Taunt. 826.

43. In a modern case, where the ancestor died seised, leaving a son and daughter infants, and on the death of the ancestor, a stranger entered; the son soon after went to sea, and was supposed to have died abroad, within age. It was held that the daughter was not entitled to twenty years, to make her entry after the death of her brother, but only to ten years; more than twenty years having elapsed in the whole since the death of the person last seised. (*a*)

To what persons and estates they extend. Ten. 178.

44. Generally all natural persons, and all freehold and leasehold estates in land, are within the [former] statutes of Limitation. And it is said by Lord Chief Baron Gilbert, that these statutes also extend to copyhold estates; being made for the preservation of public quiet; and no ways tending to the prejudice of the lord or tenant: that actions concerning copyholds are as fully and plainly within the words of these acts, as any other actions; so that there is no reason to exclude them from

(*a*) [By the 3 & 4 Will. 4. c. 27. s. 16. it is enacted, that if, at the time at which the right of any person to make an entry or distress, or bring an action to recover any land or rent, shall have first accrued according to the meaning of the act, such person shall have been under any of the disabilities hereinafter mentioned, that is to say, infancy, coverture, idiotcy, lunacy, unsoundness of mind, or absence beyond seas, then such person, or the person claiming through him, may notwithstanding the period of twenty years hereinbefore limited shall have expired, make an entry or distress, or bring an action to recover such land or rent, at any time within *ten* years next after the time at which the person to whom such right shall first have accrued as aforesaid, shall have ceased to be under any such disability, or shall have died, (which shall have first happened.) And by sect. 17 it is provided that no entry, distress, or action shall be made or brought by any person who, at the time at which his right to make an entry or distress, or to bring an action to recover any land or rent, shall have first accrued, shall be under any of the disabilities bereinbefore mentioned, or by any person claiming through him, but within *forty* years next after the time at which such right shall have first accrued, although the person under disability at such time may have remained under one or more of such disabilities during the whole of such forty years, or although the term of ten years from the time at which he shall have ceased to be under any such disability, or have died, shall not have expired. And by sect. 18 it is provided that when any person shall be under any of the disabilities hereinbefore mentioned at the time at which his right to make an entry or distress, or to bring an action to recover any land or rent, shall have first accrued, and shall depart this life without having ceased to be under any such disability, no time to make an entry or distress, or to bring an action to recover such land or rent, beyond the said period of twenty years next after the right of such person to make an entry or distress, or to bring an action to recover such land or rent, shall have first accrued, or the said period of ten years next after the time at which such person shall have died, shall be allowed by reason of any disability of any other person.]

the meaning. And Lord Kenyon held, that in the case of a copyhold, there could be no entry for a forfeiture after twenty years. (*a*) 3 Term R. 132.

45. Although it has been stated that rents cannot be devested, yet the statute 32 Hen. 8. required that avowries or conusances for any rent, suit, or service, due by custom or prescription, must have been made within fifty years. Tit. 28. c. 2. 2 Inst 96. See 3 & 4 Will. 4. c. 27. s. 1.

46. Offices with fees and profits were within the intent and meaning of the [former] statutes of Limitation. Thus in the contest which took place in the House of Lords in 1781, for the office of great chamberlain of England, the judges being asked whether the right of Lord Percy to that office was barred by the statutes of Limitation, they answered, that there having been an adverse possession of more than sixty years against him, without any actual seisin in him or his ancestors, his right would be barred in any real action by the statutes of Limitation. Tit. 25. Lords' Journ. Vol. XXXVI. 225. 18 Ed. 3. 27 a. Co. Lit. 20 a. Jehu Webb's case, 8 Rep. 47 a.

47. There are, however, some persons' estates and interests that are not comprehended within the [former] statutes of Limitation; and which are therefore not affected by a nonuser or nonclaim for any indefinite period. What are not within them.

48. Ecclesiastical corporations, and generally all ecclesiastical Ecclesiastical corporations.

(*a*) [By the first section of the before mentioned act it is enacted that the word "*land*" shall extend to manors, messuages, and all other corporeal hereditaments whatsoever, and also to *tithes*, (other than tithes belonging to a spiritual or eleemosynary corporation sole,) and also to any share, estate, or interest, in them, or any of them, whether the same shall be a freehold, or chattel interest, and whether freehold or copyhold, or held according to any other tenure; and the word "*rent*" shall extend to all heriots, and to all services and suits, for which a distress may be made, and to all annuities, and periodical sums of money, charged upon, or payable out of any land, (except moduses or compositions, belonging to a spiritual or eleemosynary corporation sole;) and the *person* through whom another person is said to claim, shall mean any person, by, through, or under, or by the act of whom the person so claiming became entitled to the estate or interest claimed, as heir, issue in tail, tenant by the curtesy of *England*, tenant in dower, successor, special or general occupant, executor, administrator, legatee, husband, assignee, appointee, devisee, or otherwise, and also any person who was entitled to an estate or interest, to which the person so claiming, or some person through whom he claims, became entitled as lord by escheat; and the word "person" shall extend to a body politic, corporate, or collegiate, and to a class of creditors, or other persons, as well as an individual; and every word importing the singular number only shall extend and be applied to several persons or things, as well as one person or thing; and every word importing the masculine gender only, shall extend and be applied to a female as well as a male.] 3 & 4 Will. 4. c. 27.

persons, seised in right of their churches, being restrained from alienation by several positive laws, are not *quoad* the estates whereof they are seised in right of their churches, within any of the statutes of Limitation; and, therefore, cannot bar their successors by neglecting to bring actions for recovery of their possessions within the time prescribed by those statutes. But an ecclesiastical person, who is guilty of this neglect, will himself be barred.

Magnum Chirographum. Tit. Ecclesia. s. 1. Fand. 251.

Advowsons.

48. There [was not until the recent statute any] limitation as to the time within which any action touching advowsons was to be brought: at least none later than the time of Richard I. For by the statute 1 Mary, c. 5. s. 4. it is enacted, that the statute 32 Hen. 8. shall not extend to a writ of right of advowson, *quare impedit*, *darrein presentment*, &c. And by the statute 7 Ann. c. 18. it is enacted, that no usurpation shall displace the estate of the patron; and that he may present on the next avoidance, as though there had not been any usurpation; which provision in effect takes away all limitations of suit about the right of patronage. (*b*)

1 Inst. 115 a. n.

(*a*) [The statute 3 & 4 Will. 4. c. 27. s. 1. extends to bodies politic, corporate, or collegiate; but exceptions are made therein as to tithes, modusses, or compositions, belonging to a spiritual or eleemosynary corporation sole. By sect. 29. it is enacted that it shall be lawful for any archbishop, bishop, dean, prebendary, parson, vicar, master of hospital, or other spiritual or eleemosynary corporation sole, to make an entry or distress, or to bring an action or suit, to recover any land or rent within such period as hereinafter is mentioned, next after the time at which the right of such corporation sole, or of his predecessor, to make such entry or distress, or bring such action or suit, shall first have accrued: that is to say, the period during which two persons in succession shall have held the office or benefice, in respect whereof such land or rent shall be claimed, and six years after a third person shall have been appointed thereto, if the times of such two incumbrances, and such term of six years taken together, shall amount to the full period of sixty years; and if such times taken together shall not amount to the full period of sixty years, then during such further number of years in addition to such six years, as will with the time of the holding of such two persons and such six years, make up the full period of sixty years; and after the said 31st day of Dec. 1833, no such entry, distress, action, or suit, shall be made or brought at any time beyond the determination of such period.]

See also 2 & 3 Will. 4. c. 100.

(*b*) [By section 30 of the 3 & 4 Will. 4. c. 27. it is enacted, that after the 31st day of Dec. 1833, no person shall bring any *quare impedit*, or other action, or any suit, to enforce a right to present to or bestow any church, vicarage, or other ecclesiastical benefice, as the patron thereof, after the expiration of such period as hereinafter is mentioned; that is to say, the period during which three clerks in succession shall have held the

50. Tithes belonging to the church were not within the [former] statutes of Limitation; because the nonclaim of the former rectors or vicars of a parish could not prejudice their successors. Nor could the mere nonpayment of tithes be set up as a defence against a lay rector, or impropriator, though a long possession of a portion of tithes would create a title. Tithes. Gilb. R. 229. Tit. 22.

51. Dignities or titles of honour are not within any of the statutes of Limitation, as has been already shewn. Dignities. Tit. 26. c. 2.

52. It has been stated in sect. 45. that quit rents and other customary and prescriptive rights are comprised within the Rents created by deed.

same, all of whom shall have obtained possession thereof adversely to the right of presentation or gift, of such person, or of some person through whom he claims, if the times of such incumbrances taken together shall amount to the full period of sixty years; and if the times of such incumbrances shall not together amount to the full period of sixty years, then, after the expiration of such further time, as with the times of such incumbrances will make up the full period of sixty years. And by sect. 31 it is provided that when on the avoidance, after a clerk shall have obtained possession of an ecclesiastical benefice adversely to the right of presentation, or gift of the patron thereof, a clerk shall be presented or collated thereto by his Majesty or the ordinary, by reason of a lapse, such last mentioned clerk shall be deemed to have obtained possession adversely to the right of presentation or gift of such patron as aforesaid; but when a clerk shall have been presented by his Majesty, upon the avoidance of a benefice, in consequence of the incumbent thereof having been made a bishop, the incumbency of such clerk shall, for the purposes of this act, be deemed a continuation of the incumbency of the clerk so made bishop. And by sect. 32 it is enacted that in the construction of this act every person claiming a right to present to, or bestow any ecclesiastical benefice, as patron thereof, by virtue of any estate, interest, or right, which the owner of an estate tail in the advowson might have barred, shall be deemed to be a person claiming through the person entitled to such estate tail, and the right to bring any *quare impedit* action or suit, shall be limited accordingly. By sect. 33 it is provided that after the said 31st day of Dec. 1833, no person shall bring any *quare impedit*, or other action, or any suit to enforce a right to present to, or bestow any ecclesiastical benefice, as the patron thereof, after the expiration of one hundred years from the time at which a clerk shall have obtained possession of such benefice adversely to the right of presentation or gift of such person, or of some person through whom he claims, or of some person entitled to some preceding estate or interest or undivided share, or alternate right of presentation or gift, held or derived under the same title, unless a clerk shall subsequently have obtained possession of such benefice on the presentation or gift of the person so claiming, or of some person through whom he claims, or of some other person entitled in respect of an estate, share, or right, held or derived under the same title. And by sect. 34. it is further enacted, that at the determination of the period limited by this act to any person for making an entry or distress, or bringing any writ of *quare impedit*, or other action or suit, the right and title of such person to the land, rent, or advowson, for the recovery whereof such entry, distress, action, or suit respectively might have been made or brought within such period, shall be extinguished.]

1 Inst. 115 a. Sup. s. 44. n.

statute of 32 Hen. 8.: but Lord Coke lays it down that this act does not extend to a rent created by deed, nor to a rent reserved upon any particular estate; for in the one case the deed is the title, and in the other the reservation.

Foster's case, 8 Rep. 64. Moor. 31. W. Jones. 238.

53. A. by deed indented made a feoffment in fee to B. and his heirs, rendering 10*s.* a-year rent to A. and his heirs; of which rent the heirs of A. had not been seised for forty years. It was determined that they might notwithstanding distrain for it: for the statute 32 Hen. 8. was intended to operate only where the avowant was driven to allege a seisin by force of some old statute of Limitation; and that was when the seisin was material, and of such force that it should not be avoided in avowry, although it were by encroachment, as between the lord and tenant. But in the case of reservation or grant of a rent, there the deed is the title, and the beginning thereof appears; no encroachment in that case shall hurt, nor is any seisin material. And this construction stands with the words of the act—"No man shall make avowry and allege seisin, &c.;" by which it appears that that branch extends only where the avowant ought to allege seisin. But where no seisin is requisite, it is out of the words and intent of the act; for it intends to limit a time for the seisin, which seisin is required by law to be alleged; and not to compel any one to allege seisin, where seisin was not necessary before.

1 Inst. 115 a. n.

54. The exemption of rent out of the statute 32 Hen. 8, should be understood with this qualification; that the certainty of the rent should appear in the deed; because otherwise the *quantum* of the rent is no more ascertained by the deed, than if there was not one existing. If therefore the rent is created by reference to something out of the deed, as by reserving such rent as the person reserving pays over, without expressing what that is; and the latter not having commenced by deed, is one of which seisin is the proper proof. In such a case seisin is equally necessary to both rents; consequently, both ought to be equally deemed within this statute.

Collins v. Goodall, 2 Vern. 235.

Fealty, &c. 1 Inst. 115 a. 2—95. 4 Rep. 10 b. Bennet v. King, 3 Lev. 21.

55. Fealty is within the letter of the statute 32 Hen. 8.; yet Lord Coke says that fealty and all other incidental services, such as heriot service, or to cover the lord's hall or the like, for that they might not happen within the times limited by that act, were, by construction out of the meaning of it.

Bond Debts, &c.

1 Burr. R. 434. Oswald *v.* Legh, 1 Term R. 270. Fladong *v.* Winter, 19 Ves. 196.

56. Bond debts and other specialties were not within the former statutes of Limitation. But where an action was brought on a bond, and the money did not appear to have been demanded, or any interest paid for twenty years, this amounted to a presumption that the bond had been paid. (*a*)

Nullum tempus act.

57. We have seen that at common law no prescription could be maintained against the King; nor was he bound by the statute 32 Hen. 8.; and this privilege also extended to the lessees of the Crown.

Lee *v.* Norris, Cro. Eliz. 331. Run. Eject. 59.

58. Thus where A. having a lease from the Crown for ninety-nine years, and being out of possession for more than twenty years, he notwithstanding recovered in ejectment; for A.'s possession was that of the King, against whom the want of possession could not be legally objected.

59. By the statute 21 Ja. 1. c. 5. it was enacted, that a quiet and uninterrupted enjoyment, for sixty years before the passing of that act, of any estate originally derived from the Crown, should bar the Crown from any right or suit to recover such

(*a*) [By the stat. 3 & 4 Will. 4. c. 27. s. 40. it is enacted, that after the 31st December 1833, money charged upon land and legacies, shall be deemed satisfied at the end of 20 years, if there shall be no interest paid, or acknowledgment in writing in the mean time. By sect. 41. no arrears of dower are, after the above day, recoverable for more than six years; so also by sect. 42. no arrears of rent or interest of money, charged upon, or payable out of land, are recoverable for more than six years. By stat. 3 & 4 Will. 4. c. 42. s. 3. (14 Aug. 1833,) it is enacted that all actions of debt for rent upon an indenture of demise, all actions of covenant or debt upon any bond or other specialty, and all actions of debt, or *scire facias* upon any recognizance, and also all actions of debt upon any award, where the submission is not by specialty, or for any fine due in respect of any copyhold estates, or for an escape, or for money levied on any *fieri facias*, and all actions for penalties, damages, or sums of money given to the party grieved, by any statute then or thereafter to be in force, that should be sued or brought at any time after the end of the then session of parliament, shall be commenced and sued within the time and limitation thereinafter expressed, and not after; namely, the said actions of debt for rent upon an indenture of demise, or covenant, or debt upon any bond or other specialty, actions of debt, or *scire facias* upon recognizance, within ten years after the end of the then session or within twenty years after the cause of such actions or suits, but not after; the said actions by the party grieved, one year after the end of the then session, or within two years after the cause of such actions or suits, but not after; and the said other actions within three years after the end of the then session, or within six years after the cause of such actions or suits, but not after; provided that nothing therein contained should extend to any action given by any statute, where the time for bringing such action was or should be by any statute specially limited.]

estate, under pretence of any flaw in the grant, or other defect of title. This act, at the time it was made, secured the rights of such as could then prove a possession of sixty years: but, from its nature, was continually diminishing in its effect, and departing from its principle; so that some new law became every day more necessary, to secure the possessions of the subject from the claims of the Crown.

60. It was therefore enacted by the statute 9 Geo. 3. c. 16.—"That the King's Majesty, his heirs or successors, shall not at any time hereafter sue, impeach, question, or implead any person or persons, bodies politic or corporate, for or in anywise concerning any manors, lands, tenements, rents, tithes, or hereditaments whatsoever, (other than liberties or franchises) or for or in anywise concerning the revenues, issues, or profits thereof, or make any title, claim, challenge, or demand, for or into the same, by reason of any right or title which hath not first accrued or grown, or which shall not hereafter first accrue and grow within the space of sixty years next before the filing, issuing, or commencing of every such action, bill, plaint, information, commission, or other suit or proceeding, as shall at any time or times hereafter be filed, issued, or commenced for recovering the same, or in respect thereof; unless his Majesty or some of his progenitors, predecessors or ancestors, heirs or successors, or some other person or persons, bodies politic or corporate, under whom his Majesty, his heirs or successors, any thing hath or lawfully claimeth, or shall have or lawfully claim, have or shall have been answered by force and virtue of any such right or title to the same rents, issues, and profits of any honour, manor, or other hereditaments whereof the premises in question shall be part or parcel, within the space of sixty years; or that the same have or shall have been duly in charge to his Majesty, or some of his progenitors, predecessors, or ancestors, heirs or successors, or shall have stood *insuper*, of record, within the said space of sixty years."

Gibson *v.* Clark, 1 Jac. & Wal. 159.

See also 2 & 3 Will. 4. c. 100.

Attorney-General *v.* Lord Eardley, 8 Price, 39.

Equity adopts the doctrine of limitations.

61. The former statutes of Limitation only fixed certain periods within which different real and personal actions might be brought in the courts of common law; and therefore did not extend to suits in equity: but the limitation of suits being founded in public convenience, and attended with so much utility, the

courts of equity have adopted principles analogous to those established by these statutes, as positive rules for their conduct. (*a*)

62. Thus Lord Camden has said, that laches and neglect were always discountenanced in equity; and therefore, from the beginning of that jurisdiction, there was always a limitation to suits. *Expedit reipublicæ ut sit finis litium*, was a maxim that had prevailed in Chancery at all times, without the help of an act of parliament. As however the Court had no legislative authority, it could not properly define the time of bar by a positive rule; it was governed by circumstances: but as often as parliament had limited the time of actions and remedies to a certain period in legal proceedings, the Court of Chancery had adopted that rule, and applied it to similar cases in equity; for where the Legislature had fixed the time at law, it would have been preposterous for equity, which by its own proper authority always maintained a limitation, to countenance laches beyond the period to which they had been confined by parliament; therefore, in all cases where the legal right has been barred by parliament, the equitable right to the same thing has been concluded by the same bar.

Smith *v.* Clay, 3 Bro. C. C. 639 n. Hovenden *v.* Annesley 2 Schoales & Lefroy, 607.

10 Ves. 466. 15 — 496.

63. In consequence of these principles it has been long settled, that where a mortgagee has been in possession for twenty years, without claim, that circumstance may be pleaded to a bill for redemption; unless there be an excuse by reason of imprisonment, infancy, coverture, or absence from the kingdom. For as the statute 21 Ja. 1. had made twenty years' possession a

Tit. 15. c. 3.

(*a*) [By sect. 24. stat. 3 & 4 Will. 4. c. 27. it is enacted, that after the said 31st day of Dec. 1833, no person claiming any land or rent in equity, shall bring any suit to recover the same but within the period during which, by virtue of the provisions hereinbefore contained, he might have made an entry or distress, or brought an action to recover the same respectively, if he had been entitled at law to such estate, interest, or right in or to the same, as he shall claim therein in equity. And by sect. 25 it is enacted that when any land or rent shall be vested in a trustee upon any express trust, the right of the *cestui que trust*, or any person claiming through him, to bring a suit against the trustee, or any person claiming through him, to recover such land or rent, shall be deemed to have first accrued, according to the meaning of this act, at and not before the time at which such land or rent shall have been conveyed to a purchaser for a valuable consideration, and shall then be deemed to have accrued only as against such purchaser and any person claiming through him.]

Anstr. R. Vol. I. 138.—Vol. III. 755.

bar to an entry and ejectment, there was the same reason for allowing it to bar a redemption. (*a*)

64. It has been generally said that trust estates are not within the statutes of Limitation (*b*): but this proposition only applies to cases arising between a *cestui que trust* and his trustee, (*c*) where there is no adverse possession; for Lord Hardwicke has justly observed that this rule holds [only as between *cestui que trust* and trustee, and not] between the *cestui que trust* and trustee on the one hand, and strangers on the other, as that would be to make the statute of no force at all; because there was hardly any estate of consequence without such trust, and so the act would never take place; therefore where a *cestui que trust* and his trustee were both out of possession for the time limited, the party in possession had a good bar against both of them.

Lewellin *v.* Mackworth, 15. Vin. Ab. 125. 2 Eq. Ca. Ab. 579. pl. 8.

Tit. 12. c. 2.

65. It has been already stated that trust estates of freehold are considered, in equity, to be as liable to be devested by abatement or intrusion as legal estates are at law; for otherwise it would be extremely difficult to ascertain in what cases, and from what periods, the statutes of Limitation should affect them.

66. With respect to equities of redemption it has been settled in the following case that where a person has made a mortgage in fee, and continues in possession of the estate, paying the interest of the mortgage, he is considered at law as tenant at will to the mortgagee of the legal estate: but in equity he is held to be the entire owner thereof, subject only to the payment of the mortgage. That his possession being nearly similar to that of a *cestui que trust* of a freehold estate, may be abated or devested by the entry of a stranger, on the death of the mortgagor; and that in such case the negligence of the heir of the mortgagor, in not claiming the estate within twenty years after such entry, will bar him from any remedy in equity.

Vid. sup. Tit. 15. c. 2. s. 1. note.

(*a*) [By stat. 3 & 4 Will. 4. c. 27. s. 28. it is enacted, that a mortgagor shall be barred at the end of twenty years, from the time when the mortgagee took possession, or from the last written acknowledgment.]

(*b*) [Vide supra, sect. 61. note.]

(*c*) [This rule only applies to the case of an express trust, and not to that of a constructive trust, 17 Ves. 97. See also Sugd. V. & P. p. 338. Ed. 6.]

67. George Earl of Orford having made a settlement of the estate in question in 1781, with a power of revocation, made a mortgage of it in fee in 1785, which it was agreed only operated as a revocation *pro tanto*, and continued in possession during the remainder of his life, paying the interest of the mortgage. Upon his death Mr. Trefusis, who afterwards became Lord Clinton, entered, conceiving himself entitled to the estate under the settlement of 1781; and paid the interest of the mortgage during his life. Upon his death Lord Clinton, as his eldest son and heir, entered and continued to pay the interest of the mortgage. George Earl of Orford was succeeded by his uncle Horace Earl of Orford, who, by a codicil to his will, devised all his real estates to Mrs. Damer in fee.

Cholmondeley *v.* Clinton, 2 Merivale's Rep. 171.

The Marquis of Cholmondeley, as the heir at law of Horace Earl of Orford, who was the uncle and heir at law of George Earl of Orford, and Mrs. Damer, as the devisee of Horace Earl of Orford, filed their bill in the Court of Chancery against the mortgagee and Lord Clinton for redemption of the mortgage to which Lord Clinton pleaded an uninterrupted possession of upwards of twenty years.

The cause was heard before Sir William Grant, M. R. who delivered his opinion in the following words:—"I come now to the third question, upon the effect of the length of time. It seems to me that there is no room in this case for the operation of the statute of Limitations; there is a possession of twenty years, but not in the character of owner of the legal estate, or under any claim of being so entitled. The subsistence of the mortgage has been all along recognized, and nothing but the equity of redemption was ever claimed by Lord Clinton. Even at law it is not mere possession that is sufficient to bar the claim of the owner; there must be something tantamount to a disseisin. Now though there may be what is deemed a seisin of an equitable estate, there can be no disseisin of it. First, because the disseisin must be of the entire estate, and not of a limited and partial interest in it; the equitable ownership, as separated from the legal ownership, cannot possibly be the subject of disseisin. And, secondly, because a tortious act can never be the foundation of an equitable title. In the case of Hopkins *v.* Hopkins, in 1 Atkyns, Lord Hardwicke, speaking Pa. 591.

of the analogy between uses and trusts, says,—'It is very true this would not have been endured if Courts of equity had not in general allowed these trust estates to have the same consideration in point of *policy* with legal estates and giving the same power to cestui que *trusts*, with respect to alienations, as if it was an use executed. Therefore a tenant in tail of a trust may bar his issue by a fine: a tenant in tail of a trust, remainder over may dock the remainder by a common recovery; nay, some go so far as to say, he may do it by a feoffment only. But all these are common assurances, and rightful methods of conveying estates; for it was never allowed that in trust estates a like estate may be gained by wrong, as there might be of a legal estate; therefore, on a trust in equity no estate can be gained by disseisin, abatement, or intrusion. It is true, it may happen so upon a trustee, and in consequence the *cestui que trust* may be affected; but that is on account of binding the legal estate: but on a bare trust no estate can be gained by disseisin, abatement, or intrusion, *whilst the trust continues*.' If George Earl of Orford had died seised of the legal fee, the late Lord Clinton, who entered on his death, would have gained an estate by abatement which could only be defeated in the first instance by entry; and after a descent cast, by an action; and after twenty years' continuance of the possession no ejectment could have been maintained. But equity does not acknowledge that Lord Clinton, by entering without title, gained any equitable interest in the estate; and a legal interest he does not profess to have acquired. An equitable title may undoubtedly be barred by length of time, but it cannot be shifted or transferred. What was once my equity, by my laches may be wholly extinguished: but it cannot, without my act, become the equity of another person. It does not therefore follow that an equity can be acquired by length of possession, because by length of possession it may be barred. Here it is admitted that the equity of redemption subsists; and so long as it subsists, the question to whom it belongs must remain open. Somebody is entitled to redeem, and to have a conveyance of the legal estate. To whom is the Court to direct the conveyance to be made; to him who shews a title, or to him who has nothing to shew but a possession of twenty years. If to the latter, then a twenty years' possession must constitute

not only a bar, but a positive title, to an equitable estate. Lord Hardwicke's position would no longer be true; for disseisin, or abatement, or intrusion, would be available modes of acquiring equitable estates.

"It will not be disputed that an equity of redemption is an equitable right; for it is only in equity that, after forfeiture, it has an existence. And although the equitable ownership be in the mortgagee, yet his ownership is of a more precarious nature than that of any other *cestui que trust*. In general a trustee is not allowed to deprive the *cestui que trust of the possession:* but a mortgagee may assume the possession whenever he pleases; and, therefore, the mortgagor is called tenant at will to the mortgagee. And in point of possession he is so even in equity; for a court of equity never interferes to prevent the mortgagee from assuming the possession. It cannot be said, therefore, that Lord Clinton, who acknowledged the title of the mortgagee, has had any other than a precarious and permissive possession, which would be insufficient for the acquisition of a right, even supposing that by any possession an equitable right could be acquired. By the civil law prescription can only run in favour of him.—*Qui neque vi, neque clam, neque precario possidet.* The permissive possession, however long it might in point of fact endure, could never ripen into a title against any body; for it is not considered as the possession of the precarious occupier, but of him upon whose pleasure its continuance depends.

"Lord Hardwicke says, I forget in what case, that the *cestui que trust* may disseise his trustee, and gain the legal estate. Doubtless the legal estate may be gained by disseisin; but that shews that the *cestui que trust* may have a substantive independent possession. But a mortgagor never can disseise his mortgagee. Why? Because his possession is not properly his own, but that of the mortgagee.

"In Harmood *v.* Oglander, it was considered as doubtful whether the trust continued to subsist, and whether the long possession had not disseised the trustee himself. And it was conceived by Lord Alvanley first, and afterwards by Lord Eldon, that if it subsisted, and if the trustee could recover, as having the legal estate, it was consequential that the right of one of the *cestui que trusts* could not be barred by the length of time

during which he had been out of possession. On that ground Lord Macclesfield in the case of Lawley *v.* Lawley in 9 Mod. over-ruled the plea of the statute of Limitations, on the ground that the legal estate was in trustees. There was a marriage settlement: one of the trusts was to pay the rents and profits to the wife, if she survived, such as the estate was then let for. The husband, during his life, greatly increased the rents of the estate; and upon his death the wife enjoyed the whole of the rents, making no distinction between the original rent, and the added rent. About fourteen years after her death the heir at law filed a bill for the purpose of receiving the surplus rents. The statute of Limitations was pleaded; and on the ground I have stated, that the estate was in trustees, Lord Macclesfield disallowed the plea.

"Now it is perfectly clear that under any other circumstances the demand for those rents would have been barred: but it was conceived that so long as the trust subsisted, so long it was impossible the *cestui que trust* could be barred. The *cestui que trust* could only be barred by barring and excluding the estate of the trustee. Now in this case the trust subsists; the mortgagee is trustee of the legal estate for the person who has the equity of redemption; and I am of opinion that the person who has the equity of redemption is the plaintiff Mrs. Damer, as the devisee of Horace Earl of Orford; for as there could be no disseisin of an equitable estate, there could be nothing to prevent his devising this interest; and the general words of his will are sufficient to include it. It does not appear to me therefore that Lord Cholmondeley could have any other interest in this estate than Mrs. Damer has thought fit to convey to him, if she has conveyed any, of which there is not any evidence in the cause; and therefore I do not conceive that I can take notice of the existence of the fact."

Sir W. Grant made no decree, having sent a case to the judges of the Court of K. B. for their opinion on the construction of the deed of settlement; and resigned before the opinion was returned. The case was therefore reheard before Sir Thomas Plumer who declared himself to be of a different sentiment from his predecessor. He said that with respect to the *dictum* in Hopkins *v.* Hopkins, he had been favoured with a manuscript note of that case in Lord Hardwicke's own handwriting, in

Tit. 32. c. 20.

2 Jac. & Walker's Rep. 1.

which instead of the words,—"while the trust continues," that constitute the last sentence of that *dictum*, in Atkyns, the words were "while the trustee continues in possession of the land;" so that it did not apply to this case.

That as to the case of Harmood *v.* Oglander it had not the least resemblance to the present one; for it related to fee-farm rents, which were not within the statutes of Limitation; and the opinions there given by Lord Alvanley and Lord Eldon did not apply to this case. As to that of Lawley *v.* Lawley, he had been furnished with a copy of it from the Register's Book, from which it appeared that the report of it in 9 Mod. was perfectly contrary to the real truth.

That Lord Redesdale, in the case Hovenden *v.* Annesley, had said he thought the statutes of Limitation must be taken virtually to include courts of equity; for when the Legislature by statute limited the proceedings at law in certain cases, and provided no express limitations for proceedings in equity, it must be taken to have contemplated that equity followed the law, and therefore it must be taken to have virtually enacted, in the same cases, a limitation for courts of equity also. 2 Schoales & Lefroy, 607.

His Honour concluded with saying that he thought time was a bar to this equitable claim by analogy, as it would be if it were a legal estate; and upon that ground he ordered the bill to be dismissed.

Upon an appeal to the House of Peers, Lord Eldon said he could not agree to, and had never heard of such a rule, as that adverse possession, however long, would not avail against an equitable estate. He meant where there was no duty which the person who had it had undertaken to discharge for him against whom he pleads adverse possession. The possession of Lord Clinton was adverse: it had been said, that it was taken by consent, founded on mistake; but that did not make the possession the less adverse, because Lord Clinton took and kept it for himself; where he owed, as it appeared to him, no duty to Lord Orford. He concluded by stating his opinion to be, that adverse possession of an equity of redemption for twenty years was a bar to another person claiming the same equity of redemption; and worked the same effect as disseisin, abatement, or intrusion, with respect to legal estates; and that for the quiet and peace of titles, and of the world, it ought to have the same effect. 2 Jac. & Walker's Rep. 190.

Lord Redesdale was clearly of opinion, that the plaintiffs were barred by the effect of the statute of Limitations, and that the bill should therefore be dismissed. He wished it to be understood that his decision rested principally on that ground. He remarked that it had been argued that the Marquis Cholmondeley might, at law, have had a writ of right; that was a writ to which particular privileges were allowed: but courts of equity had never regarded that writ, or writs of *formedon*, or others of the same nature; they had always considered the provision in the statute of James, which applied to rights and titles of entry, and in which the period of limitation was twenty years, as that by which they were bound; and it was that upon which they constantly acted. He considered that the statute was a positive law, which ought to bind courts of equity, and that the Legislature must have supposed that they would regulate their procedings by it. Sir Thomas Plumer's decree was affirmed. (*a*)

(*a*) The only question in this case was, whether a stranger, by an entry on an estate in mortgage, the mortgagee not being in possession, could divest the estate, and thereby acquire a possession adverse to that of the person who was entitled to the equity of redemption.

Now an equity of redemption being nearly similar to a trust estate, and Lord Hardwicke having held, that there might be an equitable seisin of an equity of redemption by the receipt of the rents; it seems to follow that a tortious entry on an equity of redemption, and a receipt of the rents by a stranger, would, in equity, be attended with the same consequences as a disseisin or abatement at law; for the analogy between legal and trust estates should be carried throughout. Lord Hardwicke's doctrine is founded on the great and fundamental principle upon which the Court of Chancery has acted since the time of Lord Nottingham, namely, that equity should follow the law; for, as Lord Cowper has said, 1 P. Wms. 108. If there were not the same rules of property in all Courts, all things would be at sea, and under the greatest uncertainty. 3 Blackst. Com. 441. There are, indeed, two cases in which equity has, in the construction of trust estates, deviated from the rules of law; that of dower, which is universally allowed to be wrong; and that of escheat, which has not met with any approbation.

Sir W. Grant, relying on a *dictum* in Atkyns, states the effect of an entry on a legal estate; and then denies that the same effect, or any thing analogous to it, follows from an entry on a trust estate, or an equity of redemption; and proceeds to say that Mr. Trefusis entering without title, upon the death of George Earl of Orford, did not gain any equitable interest.

It is admitted, that the entry of Mr. Trefusis did not divest the estate of the mortgagee, because he acknowledged it, by paying him interest: but as to Earl Horace, to whom the equity of redemption, conjoined with the right of possession descended; this entry being inconsistent with his estate, and destructive of the equitable seisin and interest which descended to him, divested it; and Mr. Trefusis acquired a possession adverse to that of Earl Horace. To divest is merely to turn out of possession, or to put

68. Where fraud is charged, the defendant cannot plead the statute of Limitations to the discovery of his title, but must answer to the fraud. (*b*)

vent the acquisition of a possession; and the entry of a stranger upon a vacant possession, is a divesting of the possession of the person entitled. Therefore if the maxim that equity follows the law is adhered to, the entry of Mr. Trefusis upon the death of Earl George, must be considered as an equitable abatement, and a divesting of the estate of Earl Horace; for it cannot be denied but that, in the words of Lord Coke, 1 Inst. 277 *a.* a stranger interposed himself between the death of the ancestor and the entry of the heir.

Where a stranger enters on an estate held as an equity of redemption, without acknowledging the mortgage, he divests the estate of the mortgagee; if he pays him interest on the mortgage, he thereby admits the mortgage, so that his possession being consistent with the estate of the mortgagee, does not divest it: but as the person to whom the equity of redemption really belongs is entitled to the surplus of the rents, after payment of the interest, the receipt of that surplus by a stranger, to his own use, is clearly adverse to it; for the acknowledgment of one title does not necessarily operate as an acknowledgment of another title, not derived from it. The acknowledgment of a mortgage is an acknowledgment of the title of the mortgagor: but is not an acknowledgment that A., and not B., is entitled to the equity of redemption.

When, therefore, Mr. Trefusis entered on the death of Earl George, and paid the interest of the mortgage, he acknowledged the title of the mortgagee, and also that of Earl George, who made the mortgage. But when he applied the surplus of the rents to his own use, he certainly did not acknowledge the title of Earl Horace to that surplus, but thereby divested the equity of redemption.

There is one material difference between a trust estate and an equity of redemption; namely, that, in the case of a trust estate, the trustee is bound to defend the title to the land; whereas a mortgagee is not under any such obligation. Now, in consequence of this difference, when Mr. Trefusis entered on the death of Earl George, Earl Horace could not, as in the case of a trust estate, compel the mortgagee to make an entry on the land; for while the mortgagee received his interest, he must be presumed to be perfectly indifferent as to who was entitled to redeem, and therefore could not be expected to interfere; still less to embark in a lawsuit, for the purpose of ascertaining a matter in which he was not concerned. Earl Horace was, therefore, bound to vindicate his right to the equity of redemption, which then accrued to him, by making an entry; and if that was resisted, by filing his bill in Chancery; and his acquiescence for twenty years ought to have the same effect, in equity, as a nonclaim for that period, at law.

The reasons upon which Sir W. Grant founded his opinion in this case, have a most dangerous tendency; for if it should be established that there can be no abatement, and consequently no adverse possession of a trust estate, or of an equity of redemption, then the doctrine of limitation, as adopted by the courts of equity, will be inapplicable in every case where an outstanding legal estate, which happens perpetually, or an outstanding mortgage, which is also extremely common, can be shewn to exist; for it follows from his reasoning, that if Mr. Trefusis and his descendants had been in the quiet and uninterrupted possession of the estate for a century, the decree must have been the same.—*Note by Mr. Cruise.*

(*b*) [By stat. 3 & 4 Will. 4. c. 27. sect. 26. it is enacted, that in every case of a concealed fraud, the right of any person to bring a suit in equity for the recovery of any

Bicknell *v.* Gough, 3 Atk. 558.

69. A bill was brought for a discovery of the defendant's title, charging fraud in the defendant, and praying to be let into possession of the estate. The defendant pleaded the statute of Limitations, both to the discovery and relief.

Lord Hardwicke was of opinion that the defendant could not plead the statute of Limitations to the discovery: but must answer the fraud. That as the defendant had pleaded it, it was in the nature of a demurrer; for the defendant not averring any fact to which the plaintiff might reply, but resting it on facts of the plaintiff's own shewing; if he was to allow the plea, the plaintiff could not take exceptions to the answer, and therefore over-ruled the plea.

15 Vin. Ab. 125. pl. 8. Alden *v.* Gregory, 2 Eden, 280.

70. In another case Lord Hardwicke is reported to have said—"There may be a case where the circumstance of concealing a deed shall prevent the statute's barring: but there it must be a voluntary and fraudulent detaining; for to say that merely having an old deed in one's possession, shall deprive a man of the benefit of the act, is going too far; and would be a hard construction of a statute for quieting possessions: it must therefore be an intentional concealment."

Gilbert *v.* Emerton, 3 Vern. 503. Mackenzie *v.* Powis, 7 Bro. Parl. Ca. 282.

71. It is said, that if a person sues in Chancery, and pending the suit there, the statute of Limitations attaches on his demand, and his bill is afterwards dismissed; the matter being properly determinable at law, the Court will preserve the plaintiff's right, and will direct that the defendant shall not plead the statute of Limitations in bar to the demand. But in another case it was said that the Court of Chancery would allow the statute of Limitations to be pleaded, unless the party in such suit was stayed by act of the Court, as by an injunction.

Anon. 2 Cha. Ca. 217. Tit. 35. c. 14.

1 Vern. 256. Fotherby *v.* Hartridge, 2 Vern. 21.

72. A legacy given out of real property is only recoverable in a court of equity, and therefore is not within the statutes of Limitation. It follows that length of time alone will not bar it:

land or rent, of which he, or any person through whom he claims, may have been deprived by such fraud, shall be deemed to have first accrued at, and not before the time at which such fraud shall, or, with reasonable diligence, might have been first known or discovered: provided that nothing in this clause contained shall enable any owner of lands or rents to have a suit in equity for the recovery of such lands or rents, or for setting aside any conveyance of such lands or rents on account of fraud, against any *bonâ fide* purchaser for valuable consideration, who has not assisted in the commission of such fraud, and who, at the time that he made the purchase, did not know, and had no reason to believe, that any such fraud had been committed.]

but it will raise a presumption of payment, which, unless repelled by evidence of particular circumstances, will be conclusive.

73. In a modern case, where a bill was brought for the payment of a legacy, which was resisted on the ground of presumed payment, arising from the length of time that had elapsed without any demand, which was above forty years; and because the representatives both real and personal, and all the persons who could throw any light on the subject were dead; Lord Commissioner Eyre said—"It is a presumption of fact in legal proceedings before juries, that claims, the most solemnly established on the face of them, will be presumed to be satisfied, after a certain length of time. Courts of equity would do very ill by not adopting that rule. So essential is it to general justice, that though the presumption has often happened to be against the truth of the fact, yet it is better for the ends of general justice, that the presumption should be made and favoured, and not be easily rebutted, than to let in evidence of demands of this nature, from which infinite mischief and injustice might arise."

Jones *v.* Turberville, 2 Ves. jun. 11.

The Court presumed that the legacy was paid, and dismissed the bill. (*a*)

Vide sup. note to sect. 56. page 457.

(*a*) [See Montresor *v.* Williams, MSS. cited 1 Roper's Legacies, 792. Ed. 1828.—Heard before Sir John Leach, V.C. 1823. Campbell *v.* Graham, 1 Russ. & Myl. 453. and stat. 3 & 4 Will. 4. c. 27. s. 40. supra sect. 56. note (a).]

END OF VOL. III.

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